Supreme Court, U.S.
FILED

No. _____

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In The Supreme Court of the United States

HENRI-DUVAL WINERY, L.L.C.,

Petitioner,

v.

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD, STATE OF ALABAMA, RANDALL SMITH, Individually and in his capacity as Administrator of the Alabama Alcoholic Beverage Control Board, LUCY PARSONS, individually and in her capacity as Chairman of the Alabama Alcoholic Beverage Control Board, DR. WESLEY BARRY, JR., and PHILLIP LOVELL, Individually and in their capacity as members of the Alabama Alcoholic Beverage Control Board,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court violated this Court's holding in *McKesson Corp. v. Division of Alcoholic Beverage & Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) by failing to require the Alabama Alcoholic Beverage Control Board to implement a meaningful and backward-looking remedy to cure the Commerce Cause violation caused by the State's higher taxation of foreign wines under the Table Wine Tax Act than the taxation imposed on native farm wines under the Native Farm Winery Act prior to 2001.

2. Whether the Alabama Supreme Court violated this Court's holding in *Granholm v. Heald*, 544 U.S. 460 (2005) when it refused to find that the marketing restrictions found in Alabama's excise-tax scheme on table wines prior to October 1, 2001 were discriminatory and in violation of the Commerce Clause of the United States Constitution.

3. Whether Alabama Supreme Court violated this Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) when it refused to find that Henri-Duval was the prevailing party by obtaining a ruling that the Alabama excise-tax scheme on table wines violated the Commerce Clause of the United States Constitution, and thus, entitled to an award of attorney fees under 42 U.S.C. §1988.

PARTIES TO THE PROCEEDINGS

The following list identifies all parties to the proceeding in the Alabama Supreme Court:

The Petitioner is Henri-Duval Winery, L.L.C., a California limited liability corporation. There are no corporate entities that have any ownership interest in Henri-Duval Winery, L.L.C.

The Respondents are the Alabama Alcoholic Beverage Control Board, an agency of the State of Alabama, its Director and individual Board Members: RANDALL SMITH, Individually and in his capacity as Administrator of the Alabama Alcoholic Beverage Control Board, LUCY PARSONS, individually and in her capacity as Chairman of the Alabama Alcoholic Beverage Control Board, DR. WESLEY BARRY, JR., and PHILLIP LOVELL, Individually and in their capacity as members of the Alabama Alcoholic Beverage Control Board.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Introduction	2
II. Statutory Background	5
III. Factual Background	7
IV. Proceedings Below	8
REASONS FOR GRANTING THE PETITION	12
I. The Decision Below Conflicts With This Court's Decisions Holding That A State Must Implement A Clear And Certain Remedy To Cure A Violation Of The Commerce Clause	12
II. The Decision Below Conflicts With This Court's Decisions Holding That Marketing Restrictions Imposed On Out-Of-State Wineries And Not On In-State Wineries Violate The Commerce Clause	17

TABLE OF CONTENTS – Continued

Page

III. The Decision Below Conflicts With This Court's Decisions Regarding Who Is A "Prevailing Party" In A 42 U.S.C. §1983 Action 20

CONCLUSION 24

APPENDIX A: *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. 1070257 (Ala. May 1, 2009) ..... App. 1

APPENDIX B: *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. CV-01-703 (Cir. Ct. Montgomery County, Ala., October 5, 2007) ..... App. 4

APPENDIX C: *Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, LLC*, 890 So. 2d 70 (Ala. 2004) ..... App. 5

APPENDIX D: *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. CV-01-703 (Cir. Ct. Montgomery County, Ala., July 27, 2004) ..... App. 27

APPENDIX E: *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. CV-01-703 (Cir. Ct. Montgomery County, Ala., September 17, 2001) ..... App. 29

APPENDIX F: Certificate of Judgment, *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. 1070257 (June 19, 2009) ..... App. 35

TABLE OF CONTENTS – Continued

Page

APPENDIX G: Act No. 2001-1114, Ala. Acts 2001 ..... App. 37

APPENDIX H:

Ala. Code §28-6-4 (1975) (repealed 2001) ..... App. 46

Ala. Code §28-7-24 (1975) ..... App. 47

Ala. Code §28-7-16 (1975) (repealed 2001) ... App. 48

Ala. Code §28-6-3 (1975) (repealed 2001) ..... App. 51

Ala. Code §28-7-18 (1975) (repealed 2001) ... App. 52

Ala. Code §28-3-1 (1975) ..... App. 52

Ala. Code §28-6-1 (1975) (repealed 2001) ..... App. 62

Ala. R. Civ. P. 54(b) ..... App. 63

APPENDIX I: Transcript of Proceedings, *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. CV-01-703 (Cir. Ct. Montgomery County, Ala., September 19, 2007) ..... App. 64

APPENDIX J: Complaint and Amended Complaint, *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. CV-01-703 (Cir. Ct. Montgomery County, Ala., filed March 9, 2001 and April 18, 2001) ..... App. 74

APPENDIX K: Defendants' Response to Amended Order of July 27, 2004, *Henri-Duval Winery, LLC v. Alabama Alcoholic Beverage Control Board*, No. CV-01-703 (Cir. Ct. Montgomery County, Ala., filed October 8, 2004) ..... App. 98

TABLE OF AUTHORITIES

Page

CASES

Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, LLC, 890 So. 2d 70 (Ala. 2004) ..... *passim*

Atchison, T. & S. F. R. Co. v. O'Connor, 233 U.S. 280 (1912) 13

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 3

Brown v. State, 565 So. 2d 585 (Ala. 1990) 20

City of Daphne v. City of Spanish Fort, 853 So. 2d 933 (Ala. 2003) 14

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 15

Dennis v. Higgins, 498 U.S. 439 (1990) 21

Ex parte Town of Lowndesboro, 950 So. 2d 1203 (Ala. 2006) 20

Granholm v. Heald, 544 U.S. 460 (2005) 4, 18, 19

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4, 21, 23

McKesson Corp. v. Division of Alcoholic Beverage & Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18 (1990) ..... *passim*

Meadwestvaco Corp. v. Illinois Dept. of Revenue, ___ U.S. ___, 128 S.Ct. 1498 (2008) 9

Reich v. Collins, 513 U.S. 106 (1994) 13, 15, 16

Texas Teachers Association v. Garland School District, 489 U.S. 782 (1989) 21

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. art. I, §8, cl. 3 1

U.S. Const. amend. XIV 2

Ala. Const. art. I, §13 13

Act No. 2001-1114, Alabama Acts 2001.....6, 22

Ala. Code §28-3-1(33) (1975) 7

Ala. Code §28-3-200, et seq. (1975) (repealed 1980).....5

Ala. Code §28-6-1, et seq. (1975) (repealed 2001).....5, 6, 7, 8

Ala. Code §28-7-1, et seq. (1975).....5

Ala. Code §28-7-16 (1975) (repealed 2001).....6, 7

Ala. Code §28-7-18 (1975) (repealed 2001) 6, 7, 8, 17

Ala. Code §28-7-24 (1975).....6, 10

Ala. Code §28-6-3 (1975) (repealed 2001).....6, 7, 8, 17, 19

Ala. Code §28-6-4 (1975) (repealed 2001).....5, 10

42 U.S.C. §1983 4

42 U.S.C. §1988 .....2, 11, 20, 21, 23

Rule 54(b), Ala. R. Civ. P.....9

OPINIONS BELOW

The most recent opinion of the Supreme Court of Alabama has not yet been reported but is available at 2009 WL 1164969 and is reproduced in the Appendix to this Petition ("Pet. App." at 1-3). The opinion of the Alabama Supreme Court on an earlier appeal in this case is reported at 890 So. 2d 70 and is reproduced at Pet. App. 5-26. The opinions of the Fifteenth Judicial Circuit Court of Montgomery County, Alabama which were the triggers for each appeal to the Alabama Supreme Court are unreported and are reproduced at Pet. App. 4, 74-97.

JURISDICTION

The Alabama Supreme Court entered its judgment on May 1, 2009 (Pet. App. 1-3) and on June 19, 2009, the Alabama Supreme Court overruled the application for rehearing filed by Henri-Duval Winery, LLC. (Pet. App. 35-36). On September 5, 2009, Justice Thomas extended the time to file a Petition for a writ of certiorari to November 16, 2009. This Court has jurisdiction over this case pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, U.S. Const. art. I, §8, cl. 3, states: "The

congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, §1, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. §1988(b) provides, in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

Pertinent portions of Alabama statutes and rules set forth at Pet. App. 46-63.

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves the Alabama Alcoholic Beverage Control Board's (hereinafter "ABC Board") historical discriminatory treatment of foreign wines, including those imported into Alabama by Henri-Duvall, LLC (hereinafter "Henri-Duval"), and the proper remedy to cure such discrimination.

The Alabama Supreme Court's last decision in this case, an affirmance without opinion of the trial

court's decision (Pet. App. 1-3), is contrary to many decisions of this Court. First, it is without question that Alabama's excise-tax scheme on table wines was, prior to 2001, unconstitutional in light of this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Despite the ruling in *Baccus, supra,* the ABC Board continued to discriminate against foreign wines until 2001 when this litigation forced the Alabama Legislature to remove the discriminatory effect of the excise-taxation scheme on wines in Alabama, prospectively. Not one judge or justice who considered this case disputed the fact that the Petitioner's products and those of other foreign wine manufacturers were discriminated against by the ABC Board prior to 2001, in violation of the Commerce Clause and this Court's holding in *Bacchus, supra*. Nor did any judge dispute the fact that there had to be a remedy for that discrimination pursuant to this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverage & Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990). Indeed, this was the precise holding of the Alabama Supreme Court in its first decision in this case, *Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, LLC*, 890 So. 2d 70 (Ala. 2004).

The unconstitutionality of the Alabama excise-tax scheme on wines prior to 2001 is not in dispute nor is the fact that there must be a remedy to cure the discriminatory violation of the Commerce Clause. However, despite these facts and the controlling authorities of this Court, the trial court and the Alabama Supreme Court have refused to require the

ABC Board to implement a remedy to cure the discrimination that was imposed on foreign wines, prior to 2001.

Second, the marketing restrictions contained in the Alabama Table Wine Act, which prohibited foreign wine manufacturers from selling directly to consumers and retailers while allowing native farm wine manufacturers to sell directly to consumers and retailers, were unconstitutional as decided by this Court in *Granholm v. Heald,* 544 U.S. 460 (2005). However, the trial court and the Alabama Supreme Court refused to consider these constitutional claims raised by Henri-Duval.

Third, the Alabama Supreme Court virtually ignored this Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) which allowed attorney fees to be awarded to a "prevailing party" in an action brought pursuant to 42 U.S.C. §1983, at least with respect to the claim that the wine tax scheme in Alabama was unconstitutional prior to 2001.

Despite these clearly controlling authorities, the Alabama Supreme Court and the trial court have defiantly refused to follow these cases. Review by this Court is imperative to force the ABC Board to fully comply with this Court's holdings in *McKesson*, *Granholm* and *Hensley*, and to vindicate Henri-Duval's rights guaranteed by the Commerce Clause of the United States Constitution. This Court has repeatedly had to order the courts of the State of Alabama to follow the precedents set forth by this

Court on various constitutional grounds and this case is one in which the ABC Board should not be allowed to ignore the controlling authorities of this Court regarding the constitutional rights guaranteed to every citizen under the United States Constitution.

Henri-Duval's Petition for Writ of Certiorari should be granted by this Court.

II. STATUTORY BACKGROUND

Prior to 2001, Alabama's excise-tax on table wines discriminated against out-of-state wines, facially and as applied. Historically, all wines, regardless of alcohol content, were taxed under the general taxation provisions of Chapter 3, Title 28 of the Code of Alabama (previously codified at Ala. Code §28-3-200, et seq. (1975) (repealed 1980). However, in 1979, Alabama passed the Native Farm Winery Act (previously codified at Ala. Code §28-6-1, et seq. (1975) (repealed 2001)), which treated native farm wines differently than other alcoholic beverages and wines.

The Native Farm Winery Act gave favored tax treatment to native wines by levying a tax of $.05 on a gallon of native farm wine. Ala. Code §28-6-4 (1975) (repealed 2001). (Pet. App. 46-47). In addition, Ala. Code §28-6-4(b) (repealed 2001) exempted native farm wines from the payment of all other taxes, including those imposed by Ala. Code §28-3-200, et seq. (1975) (repealed 1980). In 1980, Alabama enacted the Alabama Table Wine Act, codified at Ala. Code

§28-7-1, et seq. (1975). The Table Wine Act repealed all other taxes on wine but it specifically stated that it did not repeal the Native Farm Winery Act. Ala. Code §28-7-24 (1975). (Pet. App. 47-48). The Table Wine Act levied a $.45 per liter tax on all wines other than native wines. Ala. Code §28-7-16(a) (1975) (repealed 2001). (Pet. App. 48-51).

After the trial court in this case found that the Table Wine Tax violated the Commerce Clause and struck down this act on September 17, 2001 (Pet. App. 29-34), the Alabama Legislature passed Act No. 2001-1114, Alabama Acts 2001 (Pet. App. 37-45). Act No. 2001-1114 repealed the Native Farm Winery Act, Ala. Code §28-6-1, et seq. (1975) (repealed 2001) as well as Ala. Code §28-7-16 (1975) (Pet. App. 48-51) and Ala. Code §28-7-18 (1975) and adopted a new tax on table wine, which became effective October 1, 2001. Now codified in the current Ala. Code as §28-7-16.

Prior to the passage of Act No. 2001-1114, Ala. Acts 2001, manufacturers of native farm wines were allowed to sell their wines "to the [ABC] board, directly to consumers for off-premises consumption, to alcoholic beverage permit holders of the board, including but not limited to wholesale dealers and distributors, stores, hotels, restaurants, clubs, dining cars, and to any producer, manufacturer, wholesaler, retailer, or consumer located outside the State of Alabama." Ala. Code §28-6-3 (1975) (repealed 2001). (Pet. App. 51-52). Thus, native farm wine manufacturers could sell their wines directly to consumers, in and outside the State of Alabama and to any other entity that sold wine, thereby bypassing importers

and wholesalers. Ala. Code §28-6-3 (1975) (repealed 2001). In contrast, Ala. Code §28-7-18 (1975) (repealed 2001) (Pet. App. 52), provided that "No manufacturer [of non-native farm wines] shall sell any table wine direct to any retailer or for consumption on the premises where sold. . . ." Thus, manufacturers of foreign wines were allowed to sell their wines in Alabama *only* to licensed importers or wholesalers, thus, imposing an additional step and additional expense on these manufacturers. Ala. Code §28-7-18 (1975) (repealed 2001).

III. FACTUAL BACKGROUND

In 2001, Petitioner Henri-Duval was a California corporation that produced and manufactured table wines which were produced in California and imported into the State of Alabama for ultimate retail sale. Because Henri-Duval manufactured wines outside of Alabama, its wines were subject to the table wine tax. Ala. Code §28-7-16(a) (1975) (repealed 2001). Prior to 2001, a "table wine" was defined as "any wine containing not more than 14.9 per cent alcohol by volume." Ala. Code §28-3-1(33) (1975). (Pet. App. 52-62). The tax levied on table wines was $.45 (45 cents) per liter. Ala. Code §28-7-16(a) (1975) (repealed 2001). In contrast, a "native farm wine" was defined as "any product having an alcohol content not to exceed fourteen percent (14%) by volume and made in accordance with the revenue law of the United States, which is produced on a native farm winery." Ala. Code §28-6-1(b) (1975) (repealed 2001). (Pet. App.

62). A native farm winery was defined by §28-6-1(a) (repealed 2001) as a winery which produces 100,000 gallons or less annually and whose raw materials are produced primarily (75%) in Alabama. In 2001, there were no wineries that produced more than 100,000 gallons of wine made of raw materials produced primarily in Alabama. *Henri-Duval,* 890 So. 2d 70, n. 12 (Ala. 2004). The tax on native farm wines was $.05 (5 cents) per gallon. Thus, prior to 2001, Henri-Duval's products were being taxed 34 times higher than the tax imposed on native farm wines.

Likewise, prior to 2001, the State of Alabama prohibited Henri-Duval and other out-of-state manufacturers of wine from selling their wines to anyone other than importers or wholesalers, Ala. Code §28-7-18 (1975) (repealed 2001), while native farm wineries were allowed to sell directly to consumers and other entities both within and outside of Alabama pursuant to Ala. Code §28-6-3 (1975) (repealed 2001).

IV. PROCEEDINGS BELOW

In March of 2001, Henri-Duval, a manufacturer of foreign wines, challenged Alabama's excise-taxation scheme on table wines on the basis that it discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution. (Pet. App. 74-97). On September 17, 2001, the trial court entered a partial summary judgment in favor of Henri-Duval and held that the Alabama Table Wine Tax Act was unconstitutional

because it discriminated against interstate commerce and struck down the Table Wine Tax Act. (Pet. App. 29-34). The trial court also enjoined the ABC Board from collecting taxes pursuant to the Table Wine Tax Act after September 28, 2001 and stated that any taxes that were collected after the date of its order were to be placed in escrow. The trial court certified the summary judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. (Pet. App. 63) and the ABC Board appealed this ruling to the Alabama Supreme Court.

On appeal, the Alabama Supreme Court held that Alabama's excise-taxation scheme as a whole was unconstitutional but found the trial court had erred by striking down the Table Wine Act rather than the Native Farm Winery Act.[1] *Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, LLC*, 890 So. 2d 70 (Ala. 2004). (Pet. App. 5-26). The Supreme Court remanded the case to the trial court

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[1] Henri-Duval argued to the Alabama Supreme Court on the first appeal and maintains to this day that the Table Wine Tax should have been declared invalid rather than the Native Farm Tax because the Table Wine Tax discriminated against interstate commerce and the Native Farm Tax concerned only intrastate commerce. "The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities." *Meadwestvaco Corp. v. Illinois Dept. of Revenue*, ___ U.S. ___, 128 S.Ct. 1498 (2008) (citations omitted). Thus, since Alabama's taxation on foreign wines was discriminatory prior to 2001, Alabama lost its power to impose a tax on foreign wines and the Table Wine Tax Act rather than the Native Farm Winery Act should have been declared invalid.

to strike down the native farm tax, Ala. Code §28-6-4 (1975) (repealed 2001) and the exemption set forth in Ala. Code §28-7-24 (1975) and to allow the ABC Board to choose the remedy to cure the discriminatory treatment of foreign wines by the ABC Board prior to 2001.

On remand, the trial court never entered an order to strike the native farm wine tax and the exemption for native farm wines in the Table Wine Tax Act prior to 2001. All the trial court did on remand was to enter the following order which reads in part (Pet. App. 27-28):

> Upon review of the opinion of the Supreme Court in this matter, it is clear that Alabama's scheme for taxation of table wine was unconstitutional. This Court also notes that the offending provision, Section 28-6-4, Code of Alabama, 1975, also has been repealed by the legislature which would appear to remedy the infirmities noted by the Supreme Court.

The trial court never invalidated the native farm tax or the native farm exemption in the Table Wine Tax Act prior to 2001.

In addition, the ABC Board on remand informed the trial court that it believed "the proper remedy to be effected is to collect the difference between the Table Wine Tax and the Native Farm Wine Tax" from the native farm wineries and the trial court approved this remedy. (Pet. App. 98-112). However, during the

course of a hearing before the trial court in September of 2007, the ABC Board admitted that it never implemented the remedy it chose and it could not implement the chosen remedy because the statute of limitations had run on collecting the back taxes from the native farm wineries. (Pet. App. 64-73).

Following argument by both parties on the remaining issues raised by Henri-Duval, including whether the ABC Board was required to implement a remedy, whether the marketing restrictions in the excise-tax scheme violated the Commerce Clause and whether Henri-Duval was entitled to attorney fees as the prevailing party pursuant to 42 U.S.C. §1988, the trial court dismissed all the claims of Henri-Duval without explanation. (Pet. App. 4).

On appeal, the Alabama Supreme Court with five justices concurring and three justices concurring in part and dissenting in part affirmed the trial court's dismissal of all claims without opinion. (Pet. App. 1). The dissenting opinion authored by Justice Murdock, in which two other justices joined, disagreed with the trial court's finding that Henri-Duval was not "a 'prevailing party' for purposes of recovering an attorney fee pursuant to 42 U.S.C. §1988." It is this no opinion ruling of the Alabama Supreme Court that warrants this Court's review.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With This Court's Decisions Holding That A State Must Implement A Clear And Certain Remedy To Cure A Violation Of The Commerce Clause.

In *Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, LLC*, 890 So. 2d 70 (Ala. 2004), the Alabama Supreme Court found that Alabama's excise-tax scheme on wines violated the Commerce Clause.[2] That Court further held that "the trial court should defer to the Board's selection of a remedy **so long as the Board's remedy cures the Commerce Clause violation**." *Henri-Duval*, 890 So. 2d at 80 (emphasis added). On remand to the trial court, the ABC Board chose the remedy of collecting the back taxes from the favored class, i.e., the native farm wineries. However, almost four years after the ABC Board chose this remedy, it admitted to the trial court that the ABC Board had not implemented this remedy by collecting taxes from the favored class and was then barred from collecting such taxes by the applicable Statute of Limitations.

Instead of requiring the ABC Board to choose another viable remedy to cure the Commerce Clause

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[2] The Alabama Supreme Court remanded the case and instructed the trial court to strike the tax on native farm wines and the exemption for native farm wines from the Table Wine Tax Act. This remedial action was never done.

violation, the trial court dismissed Henri-Duval's claim for a remedy and the Alabama Supreme Court affirmed that decision without opinion. This decision by the Alabama Supreme Court demonstrates that neither the Alabama Supreme Court nor the ABC Board is willing to rectify clear constitutional violations.

"In a long line of cases, this Court has established that due process requires a 'clear and certain' remedy for taxes collected in violation of federal law. *Atchison, T. & S. F. R. Co. v. O'Connor*, 233 U.S. 280, 285 (1912)." *Reich v. Collins*, 513 U.S. 106, 108 (1994). In 1989, in *McKesson Corp. v. Division of Alcoholic Beverage & Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990), this Court, in a case factually similar to the case at bar, held that "the State's duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as *actually imposed* on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates against interstate commerce." (Emphasis in original). The reason for providing a "clear and certain remedy" is to "ensure that the opportunity to contest the tax is a meaningful one." *McKesson*, 496 U.S. at 39.[3] To this day, the ABC Board has taken no

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[3] Art. I, §13 of the Alabama Constitution of 1901 also provides that "every person, for any injury done him, in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay."

steps to ensure that the tax as "actually imposed" on Henri-Duval's wines and those of other foreign wine manufacturers "during the contested tax period" was not discriminatory under the Commerce Clause.

Even in its opinion on the first appeal of this case, which invalidated the wine tax scheme in this case, the Alabama Supreme Court declared that there had to be a remedy for the Commerce Clause violation. Quoting from this Court's opinion in *McKesson*, the Alabama Supreme Court declared:

> The State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same reduction that its competitors actually received. . . . Alternatively, to the extent consistent with other constitutional restrictions,[4] the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create a nondiscriminatory scheme.

Henri-Duval, 890 So. 2d at 80.

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[4] In the case at bar, Henri-Duval doubts whether the ABC Board could have legally collected back taxes from the favored class because "the levy of a tax is a legislative power and such relief cannot be had in the courts," or for that matter in an agency of the State of Alabama. *City of Daphne v. City of Spanish Fort*, 853 So. 2d 933, 945 (Ala. 2003).

While the State chose a remedy, it never implemented its remedy by collecting the higher tax from native farm wineries and cannot legally do so now. Thus, the deprivation of Henri-Duval's constitutional rights continues to this day. Both the trial court's and the Alabama Supreme Court's ruling implies that the mere act of choosing a remedy is sufficient to cure a constitutional deprivation, regardless of the fact that the remedy was never implemented. This flies in the face of this Court's ruling in *McKesson*, 496 U.S. at 31, that a State has the obligation "to provide meaningful backward-looking relief to rectify any constitutional deprivation."

This case is somewhat similar, albeit more egregious, to what occurred in *Reich v. Collins*, 513 U.S. 106 (1994). Prior to the decision in *Reich*, this Court decided *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) which declared unlawful state statutory schemes that exempted from taxation retirement benefits paid by a state but which did not exempt retirement benefits paid by the Federal Government. Following this decision, Georgia repealed its statutes which provided an exemption for state retirees and Reich, a federal retiree, sought a refund of the taxes he paid. The Georgia Supreme Court held that Reich should have availed himself of the predeprivation procedures that were available to him and denied Reich a refund. In reversing the decision of the Georgia Supreme Court and discussing the requirement of a "clear and certain" remedy, this Court stated:

> A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (post-deprivation), or both. But what it may not do, and what Georgia did here, is hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.

Reich, 513 U.S. at 108.

Likewise, the ABC Board cannot hold out the hope of a "clear and certain" remedy by choosing a remedy which is never implemented and which later proves to be legally impossible to implement. Not only was the remedy chosen by the ABC Board not "clear and certain," it was no remedy at all. This is no different than the "bait and switch" tactics condemned by this Court in *Reich*.

As the Alabama Supreme Court noted in *Henri-Duval*, 890 So. 2d at 80, the court "should defer to the Board's proposed remedy **so long as the Board's proposed remedy cures the Commerce Clause violation**." However, a remedy "proposed" but never implemented cannot satisfy the ABC Board's "constitutional obligation to provide relief" in this case. *McKesson*, 496 U.S. at 46. The ABC Board had to at least engage in "a good-faith effort to administer and enforce such a retroactive assessment" in order to "constitute adequate relief." *McKesson, id.*, at n. 23. The failure of the ABC Board to even make a

"good-faith effort" does not comport with Due Process or the principles set forth by this Court in *McKesson*.

This Court must answer the question of whether the mere act of choosing a remedy which is never implemented is sufficient under the Due Process Clause of the United States Constitution. Review by this Court is imperative because without action by this Court, the ABC Board and the State of Alabama will feel free to violate clear constitutional principles and the decisions of this Court with knowledge that those violations have no consequences. As a result, those whose rights are violated will be deprived the right to seek meaningful relief for constitutional deprivations.

II. The Decision Below Conflicts With This Court's Decisions Holding That Marketing Restrictions Imposed On Out-Of-State Wineries And Not On In-State Wineries Violate The Commerce Clause.

Prior to 2001, Alabama's excise-tax scheme on wines allowed out-of-state manufacturers to sell only to importers or wholesalers, Ala. Code §28-6-3 (1975) (repealed 2001) while native farm wineries were allowed to sell directly to consumers and other entities within and outside of the State of Alabama. Ala. Code §28-7-18 (1975) (repealed 2001). Could the State of Alabama prohibit out-of-state wine manufacturers from selling directly to consumers and other entities

within Alabama while allowing Alabama manufacturers of wine to do so? The answer to this question was explicitly decided by this Court in *Granholm v. Heald*, 544 U.S. 460 (2005). In *Granholm*, this Court considered similar statutory schemes that existed in Michigan and New York. Michigan's statutory scheme banned out-of-state wineries from shipping directly to consumers while allowing in-state wineries to ship wine directly to consumers. On the other hand, New York did not prohibit out-of-state wineries from the direct shipment of wine to consumers but made it much more difficult for out-of-state wineries to engage in direct shipment to consumers than it was for in-state wineries.

This Court explicitly found that such marketing restrictions directed toward out-of-state manufacturers of wine were unconstitutional under the Commerce Clause. In considering this precise issue, with regard to the Michigan statutory wine scheme which is very similar to Alabama's prohibition on out-of-state wineries from selling to anyone other than importers or wholesalers, this Court held,

> The Michigan system's discriminatory character is obvious. Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state

> wine, but not all in-state wine, to pass through an in-state wholesaler and retailer[5] before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar wineries from the Michigan market.

Granholm, 544 U.S. at 474.

It is without question that the marketing restrictions on out-of-state wine manufacturers that were in place under Alabama's wine statutes prior to 2001 violate the Commerce Clause and are unconstitutional pursuant to this Court's holding in *Granholm*. Despite the fact that *Granholm* was released when this claim was pending before the trial court, and despite the fact that *Granholm* specifically found marketing restrictions on wine such as those included within Alabama's wine statutes were unconstitutional, the trial court and the Alabama Supreme Court completely ignored the decision of this Court in *Granholm* and refused to address this claim below. This is another compelling reason why this Court should review this cause. The State of Alabama's blatant defiance of the decisions of this Court must be addressed by this Court and rectified by this Court.

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[5] Under Alabama law, prior to 2001, foreign wines could not even be sold to retailers. Ala. Code §28-6-3 (1975) (repealed 2001).

III. The Decision Below Conflicts With This Court's Decisions Regarding Who Is A "Prevailing Party" In A 42 U.S.C. §1983 Action.

After the Alabama Supreme Court released its decision in the first appeal, *Alabama Alcoholic Beverage Control Board v. Henri-Duval*, 890 So. 2d 70 (Ala. 2004), Henri-Duval filed with the trial court a Motion for Award of Interim Attorneys' Fees. (Pet. App. 113-118). Initially, Henri-Duval sought fees under the "common benefit" exception to the American Rule as set forth by the Alabama Supreme Court in *Brown v. State*, 565 So. 2d 585 (Ala. 1990). However, after the Alabama Supreme Court found that such awards were barred by sovereign immunity in *Ex parte Town of Lowndesboro*, 950 So. 2d 1203 (Ala. 2006), Henri-Duval amended the Motion for Award of Interim Attorney's Fees to include a request for fees pursuant to 42 U.S.C. §1988. (Pet. App. 119-122).

By the trial court's dismissal of all of Henri-Duval's claims, the trial court refused to recognize that Henri-Duval was the prevailing party in this case and the majority of the Alabama Supreme Court did so as well by affirming the trial court without issuing an opinion. However, three members of that Court, dissented "to the extent that the trial court determined that Henri-Duval Winery, L.L.C., has not been a 'prevailing party' for purposes of recovering an attorney fee pursuant to 42 U.S.C. §1988." Clearly, pursuant to many decisions of this Court, the dissenters were correct on the issue of whether

Henri-Duval was the prevailing party and thus, entitled to an award of attorney fees.

In order to be entitled to attorney fees pursuant to 42 U.S.C. §1988, one must be a "prevailing party." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). This Court has consistently stated that one is entitled to attorney fees pursuant to 42 U.S.C. §1988, if that "plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit . . . " *Texas Teachers Association v. Garland School District*, 489 U.S. 782, 791-92 (1989). However, "at a minimum . . . the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792. The resolution of the dispute which changed the relationship between Henri-Duval and the ABC Board occurred first, when the trial court struck down the Table Wine Tax Act and second, when the Alabama Supreme Court found that Alabama's excise-tax scheme on wines violated the Commerce Clause.[6] *Henri-Duval*, *supra*.

When the trial court in this case initially struck down the Table Wine Tax Act, it enjoined the ABC Board from further collection of the table wine tax, including any taxes from Henri-Duval. Because of the

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[6] This Court held in *Dennis v. Higgins*, 498 U.S. 439 (1990) that Commerce Clause claims can be brought pursuant to 42 U.S.C. §1983.

trial court's injunction, the Alabama Legislature, in a special session of the Legislature, passed Act No. 2001-1114, Ala. Acts 2001, which cured the Commerce Clause violation of which Henri-Duval had complained retroactive to the effective date of the trial court's order. Due to the success of Henri-Duval in securing a determination from the trial court that the excise-tax on foreign wines was unconstitutional, the Legislature of Alabama was forced to cure the Commerce Clause violation prospectively in order to recover the monies lost due to the trial court's injunction.

Then, on appeal, the Alabama Supreme Court held that Henri-Duval had "standing to seek a declaration that the excise-tax scheme for table wines violates the Commerce Clause" and "that Alabama's scheme of taxation for table wine embodied in the Table Wine Act read together with the Native Farm Winery Act violates the Commerce Clause." *Henri-Duval*, 890 So. 2d at 75, 80. Lastly, the Alabama Supreme Court following the Court's decision in *McKesson*, *supra*, concluded that there had to be a remedy to cure the constitutional violation. The Supreme Court however, allowed the ABC Board to pick the remedy "so long as the Board's proposed remedy cures the Commerce Clause violation."[7] *Henri-Duval*,

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[7] It could be argued that Henri-Duval did not succeed on every claim because the ABC Board should be allowed to pick the remedy rather than Henri-Duval, even though the Alabama Supreme Court held that the remedy chosen by Henri-Duval

(Continued on following page)

890 So. 2d at 80. Thus, Henri-Duval was successful in obtaining a ruling which would cure the discrimination retroactively.

Unfortunately, as set forth in the first section of this Petition, a remedy was chosen but never implemented. If this is all that is necessary to satisfy the requirements of due process (i.e., that a remedy is chosen but not implemented), then Henri-Duval has totally prevailed on this most significant claim in this case, (i.e., that the excise-tax scheme was unconstitutional and that there must be a remedy for that violation), and is entitled to an award of attorney fees under 42 U.S.C. §1988. On the other hand, if a "clear and certain" "backward-looking meaningful" remedy must actually be implemented, then clearly this Petition is meritorious on the basis that the Alabama Supreme Court erred by failing to require the ABC Board to implement a remedy. This is certainly a compelling reason this Court should grant certiorari review in this case.

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and adopted by the trial court in its first opinion was completely acceptable. *Henri-Duval, supra.* However, "a plaintiff who has won substantial relief should not have his attorney's fee reduced [or denied as in this case] simply because the district court [or the Alabama Supreme Court] did not adopt each contention raised." *Hensley*, 461 U.S. at 440.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 16, 2009

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APPENDIX A

REL: 05/01/2009

Notice: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 (334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2008-2009

1070257

Henri-Duval Winery, L.L.C

v.

Alabama Alcoholic Beverage Control Board et al

Appeal from Montgomery Circuit Court (CV-01-703)

BOLIN, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Stuart, Smith, Parker, and Shaw, JJ., concur.

Lyons, Woodall, and Murdock, JJ., concur in part and dissent in part.

Cobb, C.J., recuses herself.

LYONS, Justice (concurring in part and dissenting in part).

I concur in the affirmance of the trial court's judgment in this case in all respects except for the affirmance of the trial court's disallowance of an attorney fee for Henri-Duval Winery, L.L.C. As to this issue, I join Justice Murdock's special writing.

MURDOCK, Justice (concurring in part and dissenting in part).

I concur in the affirmance of the trial court's judgment on remand in this case, *see Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery, L.L.C.*, 890 So. 2d 70 (Ala. 2004), except to the extent that the trial court determined that Henri-Duval Winery, L.L.C., has not been a "prevailing party" for purposes of recovering an attorney fee pursuant to 42 U.S.C. § 1988. *See, e.g., Grier v. Goetz*, 421 F. Supp. 2d 1061, 1068-69 (M.D. Tenn. 2006) (discussing relevant United States Supreme Court precedents); *James v. Alabama Coal. for Equity, Inc.*, 713 So. 2d 937, 947 (Ala. 1997) (quoting *Texas State*

Teachers' Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 789 (1989)).

Lyons and Woodall, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

Henri Duval Winery, L.L.C.	)	
Plaintiff,	)	
vs.	)	**CV-2001-703**
Alabama ABC Board et al.	)	
Defendants.	)	

ORDER

This matter comes before this Court following a reinstatement of all of the Plaintiff's claims. After a review [of] all of the relevant pleadings in this case and a reconsideration of arguments by counsel and the evidence presented to this Court, it is therefore the Order of this Court that all claims of the Plaintiffs are hereby due to be dismissed.

Done this 5 day of Oct. 2007.

/s/ Truman M. Hobbs, Jr.
TRUMAN M. HOBBS, JR.
Circuit Judge

cc: J. Doyle Fuller
James H. Anderson

APPENDIX C

ALABAMA ALCOHOL. BEV. BD. v. HENRI-DUVAL WINERY, 890 So.2d 70 (Ala. 2004)

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD v. HENRI-DUVAL WINERY, L.L.C.

1010070.

Supreme Court of Alabama.

September 19, 2003.

As Modified on Denial of Rehearing April 30, 2004.

Appeal from the Circuit Court, Montgomery County, No. CV-2001-703, Sarah M. Greenhaw, J.

William H. Pryor, Jr., atty. gen.; and James H. Anderson and Daniel O. Rodgers, deputy attys. gen., of Beers, Anderson, Jackson, Hughes & Patty, P.C., Montgomery, for appellant.

J. Doyle Fuller, Montgomery; and Robert B. Roden of Shelby & Cartee, Birmingham, for appellee.

Mary E. Pons, Montgomery, for amicus curiae Association of County Commissions of Alabama, in support of the appellant.

SEE, Justice.

The State of Alabama levies excise taxes on wine under the Alabama Table Wine Act, § 28-7-1 et seq., Ala. Code 1975; it formerly levied excise taxes under the Alabama Native Farm Winery Act, § 28-6-1 et seq., Ala. Code 1975. The Alabama Alcoholic Beverage Control Board ("the Board") appeals from the

judgment of the Montgomery Circuit Court holding that § 28-7-16, Ala. Code 1975, the Code section pursuant to which the excise tax is levied, violates the Commerce Clause and is therefore unconstitutional. We reverse and remand.

Historically, all wine sold in Alabama was taxed under the general taxation provisions in § 28-3-200 et seq., Ala. Code 1975. In 1979, the Legislature passed the Native Farm Winery Act, which levied an excise tax of $.05 per gallon on all native farm wine sold in Alabama or dispensed as free samples at a native farm winery.[1] § 28-6-4(b), Ala. Code 1975. The Native Farm Winery Act also exempted native farm wine from all other taxes, including those levied under § 28-3-200 et seq.[2] § 28-6-4(b), Ala. Code 1975.

In 1980, the Legislature enacted the Alabama Table Wine Act. The Table Wine Act levied an excise

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[1] The act defined a "native farm winery" as a winery where the annual wine production did not exceed 100,000 gallons and where at least 75% of the berries, fruit, produce, or honey used to make the wine was grown or produced in Alabama by the winery. § 28-6-1(1), Ala. Code 1975. It defined "native farm wine" as wine produced on a native farm winery. § 28-6-1(2), Ala. Code 1975. The act stated: "The excise tax provided for in this section shall be in lieu of all other taxes imposed." § 28-6-4(b), Ala. Code 1975. The Native Farm Winery Act was repealed effective September 30, 2001. Act No. 2001-1114, Ala. Acts 2001 (4th Spec.Sess.).

[2] The Native Farm Winery Act provided, in pertinent part: "The excise tax provided for in this section shall be in lieu of all other taxes imposed." § 28-6-4(b), Ala. Code 1975.

tax of $.45 per liter on all table wine "sold to [a] wholesale licensee or [the Board], to be collected from the purchaser by the [Board] or by a licensed retailer." § 28-7-16, Ala. Code 1975.[3] The Table Wine Act stated that "the tax levied is in fact a levy on the consumer." § 28-7-16(b), Ala. Code 1975. The Table Wine Act repealed all other taxes on wine, but it did not repeal the tax-exemption provision in the Native Farm Winery Act.[4] § 28-7-24, Ala. Code 1975.

In March 2001, Henri-Duval Winery, L.L.C. ("Duval"), sued the Board, alleging that § 28-7-16, Ala. Code 1975, imposed an unconstitutional excise tax on wine moving in interstate commerce in

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[3] The excise-tax provision of the Table Wine Act, § 28-7-16, Ala. Code 1975, was repealed by Act No. 2001-1114, Ala. Acts 2001, and it was replaced with a new § 28-7-16. The new § 28-7-16 likewise imposes an excise tax of $.45 per liter on all table wine.

[4] Section 28-7-24 reads:

> "All laws or parts of laws which conflict or are inconsistent with this chapter are hereby repealed. The taxes imposed by Sections 28-3-200, 28-3-201, 28-3-202, 28-3-203 and 28-3-204 do not apply to the sale of table wine; provided, that, nothing herein contained shall be construed to relieve any person from any tax liability, penalty or forfeiture incurred thereunder or under any local tax, county or municipal, hereby repealed, nor be construed to repeal any provision of law respecting the enforcement of any such tax liability, penalty or forfeiture incurred; provided further, that nothing herein contained shall be construed to repeal or as repealing Chapter 6 of this title [the Native Farm Winery Act]."

violation of the Commerce Clause. Duval argued that Alabama's table-wine tax scheme discriminated against wine produced outside Alabama because it exempted from the excise tax Alabama native farm wine.[5] Duval sought a declaration that § 28-7-16, Ala. Code 1975, was unconstitutional. Duval also sought injunctive relief, a refund of wrongfully collected taxes, and certification of a class composed of all producers, manufacturers, importers, and distributors of table wine to participate in any damages award. The Board filed a counterclaim stating that the excise-tax provisions of the Table Wine Act do not discriminate against foreign wine, and arguing that if the trial court found Alabama's excise-tax scheme for table wine unconstitutional, the trial court should uphold the excise tax in the Table Wine Act, § 28-7-16, Ala. Code 1975, and instead find the tax exemption in the Native Farm Winery Act, § 28-6-1 et seq., Ala. Code 1975, unconstitutional.

Duval moved for a partial summary judgment on the issue whether § 28-7-16, Ala. Code 1975, violated

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[5] The Board noted in its brief that in 2000 Alabama native farm wineries produced about 6,000 gallons (approximately 22,712 liters) of native farm wine. Assuming that all of that wine was sold in Alabama, the essence of Duval's complaint is that because of the excise-tax exemption for native farm wine, Alabama consumers, on whom the table-wine tax falls, underpaid excise tax on their purchase of native farm wine in the amount of approximately $10,219.50, and that that undertaxation put Duval at a competitive disadvantage.

the Commerce Clause and was therefore unconstitutional. The trial court granted Duval's motion and held that the excise tax in § 28-7-16, Ala. Code 1975, was discriminatory and unconstitutional; that the Native Farm Winery Act, § 28-6-1 et seq., Ala Code 1975, is not subject to the Commerce Clause because it regulates intrastate commerce; and that the Board lacked standing to contest the constitutionality of the Native Farm Winery Act. The trial court certified that summary judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., and ordered that all taxes collected pending the appeal of its decision be placed in escrow. The Board now appeals.

> "'The standard of review applicable to a summary judgment is the same as the standard for granting the motion, that is, we must determine whether there was a genuine issue of material fact and, if not, whether the movant was entitled to a judgment as a matter of law. Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and resolve all reasonable doubts against the movant. *Wilson v. Brown*, 496 So.2d 756, 758 (Ala. 1986); *Harrell v. Reynolds Metals Co.*, 495 So.2d 1381 (Ala. 1986). See also *Hanners v. Balfour Guthrie, Inc.*, 564 So.2d 412 (Ala. 1990).'"

Gonzalez, LLC v. DiVincenti, 844 So.2d 1196, 1200-01 (Ala. 2002) (quoting *Brewer v. Woodall*, 608 So.2d 370, 372 (Ala. 1992)). "For purposes of ruling on a motion to dismiss for want of standing, both the trial

and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

The Board argues on appeal (1) that it has standing to ask the trial court to determine the constitutionality of the Native Farm Winery Act; (2) that the trial court erred in declaring the excise-tax provision in the Table Wine Act unconstitutional; (3) that the trial court erred in holding that the Native Farm Winery Act was not governed by the Commerce Clause; and (4) that the trial court erred by ordering that any excise taxes collected under the Table Wine Act be held in escrow.

Duval takes no position in this appeal on the issue of standing. Duval argues that the trial court's rulings on the constitutional issues are correct and that the escrow order will be mooted by this Court's decision on the constitutional questions.

Standing

The Board argues that the trial court erred when it found that the Board lacked standing to challenge the constitutionality of the Native Farm Winery Act under the Commerce Clause. Duval takes no position on that issue on appeal, but Duval argued to the trial court:

> "How have the Defendants in this case suffered an injury from the provisions of the Native Farm Wine Tax? It's simple; they have not. Hence they do not have standing to assail it and hence, there is no case or controversy. At the same time, [Duval] has not suffered an 'injury directly arising' from the Native Farm Wine Tax, hence we have no standing to attack it and have not attacked it. We have standing to assail on the tax applied to our products. That is the Table Wine Tax. While it may be that we have been injured because of the existence of the Native Farm Wine Tax, and its exemptions of those wines from the Table Wine Tax, we have been injured by the tax imposed on us by the Table Wine Tax Act."

A party establishes standing to bring a challenge under the Commerce Clause when it demonstrates the existence of (1) an actual, concrete and particularized "injury in fact" – "an invasion of a legally protected interest"; (2) a "causal connection between the injury and the conduct complained of"; and (3) a likelihood that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). A party must also demonstrate that "he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth,* 422 U.S. at 518, 95 S.Ct. 2197.

In *Stiff v. Alabama Alcoholic Beverage Control Board,* 878 So.2d 1138, 1144 (Ala. 2003), this Court

held that Stiff, a consumer of table wine, had standing to challenge the tax scheme established in the Table Wine Act and the Native Farm Winery Act because the Table Wine Act requires consumers to pay the taxes levied therein. See also *City of Mobile v. M.A.D., Inc.*, 684 So.2d 1283 (Ala. 1996) (finding that the Legislature intended that consumers pay the tax on table wine); *Bridenbaugh v. Freeman-Wilson,* 227 F.3d 848, 850 (7th Cir. 2000) (finding that the consumers had standing under the Commerce Clause to challenge discriminatory state laws regulating the out-of-state purchase of alcohol because "every interstate sale has two parties, and entitlement to transact in alcoholic beverages across state lines is as much a constitutional right of consumers as it is of shippers"). Duval does not have standing to bring this action to seek a refund, because, as it asserted to the trial court, the Table Wine Act requires that consumers pay an excise tax on Duval's product.[6] *Cf. Lac*

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[6] "'Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.' *National Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 255, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994). '"[L]ack of standing [is] a jurisdictional defect."' *State v. Property at 2018 Rainbow Drive,* 740 So.2d 1025, 1028 (Ala. 1999) (quoting *Tyler House Apartments, Ltd. v. United States,* 38 Fed. Cl. 1, 7 (Fed.Cl. 1997)).' [J]urisdictional matters are of such magnitude that we take notice of them at any time and do so even *ex mero motu.*' *Nunn v. Baker,* 518 So.2d 711, 712 (Ala. 1987).''

Ex parte Fort James Operating Co., 871 So.2d 51, 54 (Ala. 2003). Therefore, it is proper for us to consider whether Duval has standing to bring this action.

Courte Oreilles Band of Lake Superior Chippewa Indians v. I.R.S., 845 F.2d 139, 142 (7th Cir. 1988) (holding that "only the person legally liable for paying a given federal tax may bring a refund suit"); *United States v. Williams*, 514 U.S. 527, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995) (noting that common-law action of assumpsit for money had and received provided a remedy for those who had paid taxes they did not owe); *Cook Oil Co. v. United States*, 919 F.Supp. 1556 (M.D.Ala. 1996) (finding that taxpayer who paid disputed taxes had standing to sue for a refund).[7] Duval has standing to seek a declaration that the excise-tax scheme for table wine violates the Commerce Clause because the Table Wine Act, operating together with the Native Farm Winery Act, may injure Duval's business by placing Duval's product at a competitive disadvantage.[8] See *Johnson Bros. Wholesale Liquor Co. v. Comm'r of Revenue* (Nos. 4264 and 4332, Oct. 1, 1986) (Minn. Tax Ct. 1996) (unpublished) (finding that the proper method to determine the injury to winemakers was to measure the adverse impact of the tax-rate differential on the out-of-state winemakers' business). The Board has standing to bring

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[7] Alabama has no statutory provision under which a consumer may seek a refund of an excise tax on table wine paid by a mistake of law or fact. Section 28-3-54 provides only that a licensee of the Board may apply for a refund of any excess tax or tax erroneously paid.

[8] We do not reach the questions whether Duval, in fact, has been placed at a competitive disadvantage or has been injured by such a disadvantage.

its counterclaim seeking a declaration that the Native Farm Winery Act violates the Commerce Clause because Duval has questioned Alabama's entire excise-tax scheme for table wine and, therefore, has affected the State's interest in regulating the sale of alcohol in Alabama. See *Beskind v. Easley,* 325 F.3d 506, 518 (4th Cir. 2003) (finding that North Carolina had an interest in its Alcoholic Beverage Control laws and in deciding which of those laws the court would strike down as unconstitutional).[9] See also *Hunt v. Chemical Waste Mgmt., Inc.,* 584 So.2d 1367, 1390 (Ala. 1991) (rev'd on other grounds) (holding that because Chemical Waste Management sued the State, a justiciable controversy existed and the Governor had standing to file a counterclaim seeking a declaratory judgment); *Simpson v. Van Ryzin,* 289 Ala. 22, 265 So.2d 569 (1972) (holding that a justiciable controversy exists when an officer of the State is uncertain as to what the law means and pursues a course of conduct that would injure the interests of others who contend that the State officer has no legal right to act). Duval's action threatens the State's regulatory scheme, and a ruling in the Board's favor on its counterclaim will protect the State's interest in maintaining its

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[9] The court noted in *Beskind* that the Twenty-First Amendment protects "States' interests in 'promoting temperance, ensuring orderly market conditions, and raising revenue,' all in connection with the manufacture, shipment, and use of alcoholic beverages." 325 F.3d at 513 (quoting *North Dakota v. United States,* 495 U.S. 423, 432, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) (plurality opinion)).

regulatory framework. We, therefore, reverse the trial court's judgment insofar as it held that the Board lacks standing to bring its counterclaim.

Constitutionality of the Excise-Tax Scheme

The Board argues that Alabama's taxation of table wine is permitted by the Twenty-First Amendment and does not violate the Commerce Clause because, it argues, the wine produced by native farm wineries does not compete with foreign wine. In *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the United States Supreme Court considered issues virtually identical to those presented in this case. In *Bacchus,* the State of Hawaii imposed an excise tax on liquor but exempted locally produced liquor from taxation. Bacchus sued Hawaii, alleging that the discriminatory tax violated the Commerce Clause. Hawaii argued that the Twenty-First Amendment saved its tax scheme from the Commerce Clause challenge and that its locally produced liquors – okolehao and pineapple wine – did not compete with imported liquor subject to the excise tax.[10]

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[10] Section 2 of the Twenty-First Amendment provides: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Supreme Court held that the Twenty-First Amendment "did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." 468 U.S. at 275, 104 S.Ct. 3049. The Supreme Court stated that whatever may have been the purpose of Section 2 of the Twenty-First Amendment, "[t]he central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." 468 U.S. at 276, 104 S.Ct. 3049.[11]

The Supreme Court also rejected Hawaii's argument that the locally produced liquor did not compete with the imported liquor:

> "However, neither the small volume of sales of exempted liquor nor the fact that the exempted liquors do not constitute a present 'competitive threat' to other liquors is dispositive of the question whether competition exists between the locally produced beverages and foreign beverages; instead, they go only to the extent of such competition. It is well settled that '[w]e need not know how unequal the Tax is before

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[11] Justice Stevens dissented in *Bacchus*; he argued that because the Twenty-First Amendment permits a state to regulate the importation of liquor into the state, a state may impose a discriminatory tax on imported liquor. See 468 U.S. at 279, 104 S.Ct. 3049 (Stevens, J., dissenting). The Board urges this Court to adopt the position advocated by Justice Stevens in his *Bacchus* dissent. We decline that invitation.

> concluding that it unconstitutionally discriminates.'"

468 U.S. at 269, 104 S.Ct. 3049 (footnote omitted) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 760, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)). The Supreme Court then held that "Hawaii's liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had the purpose and effect of discriminating in favor of local products." 468 U.S. at 273, 104 S.Ct. 3049 (footnote omitted).

Although we agree with the Board that the State has an interest, protected by the Twenty-First Amendment, in regulating the sale and consumption of table wine, and although we agree that the facts in this case demonstrate that native farm wine constitutes only a small fraction of wine sold in Alabama,[12] applying the rationale of the Supreme Court in *Bacchus*, we conclude that neither of those arguments is sufficient to overcome the defect in Alabama's tax scheme that results in a Commerce Clause violation. In the present case, § 28-7-16, Ala. Code 1975, requires consumers of table wine to pay an excise tax on table wine, while §28-6-4(b), Ala. Code 1975, exempts native farm wine from that consumer excise

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[12] The Board noted that there are only 8 active native farm wineries in Alabama and that their combined production in 2000 totaled approximately 6,000 gallons of wine. The Board also noted that Alabama's Alcoholic Beverage Control stores no longer carry native farm wine because of sluggish sales.

tax.[13] Therefore, as in *Bacchus,* the tax scheme at issue in this case violates the Commerce Clause by discriminating against foreign wine.

This conclusion, however, does not end our analysis. In this case, the trial court found only the excise tax in the Table Wine Act, specifically § 28-7-16, Ala. Code 1975, unconstitutional under the Commerce Clause; the trial court found that it could not consider the tax exemption in the Native Farm Winery Act, § 28-6-4(b), Ala. Code 1975, because the Native Farm Winery Act dealt only with intrastate commerce. The Board argues that the trial court should have considered the entire statutory scheme for taxing table wine as a whole. The Board argues that §28-7-16, Ala. Code 1975, levies a nondiscriminatory excise tax

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[13] Section 28-6-4(b), Ala. Code 1975, imposes an excise tax on native farm wine, but that tax falls on winemakers, not consumers. Section 28-6-4(b), Ala. Code 1975, reads, in pertinent part: "There is hereby levied and assessed an excise tax upon each case of native farm wine sold by a manufacturer to any source to be collected from the manufacturer in an amount equal to $.05 per gallon." In *M.A.D.* this Court considered similar statutory language when it addressed the incidence of excise taxes imposed on "the purchaser" of liquor in §§ 28-3-201 through 205, Ala. Code 1975. This Court held that because liquor retailers "purchase" liquor from the Board, and because the tax statutes do not require the retailers to pass the liquor taxes on to consumers, the taxes at issue were not taxes on liquor consumers. 684 So.2d at 1288. Therefore, because nothing in § 28-6-4(b), Ala. Code 1975, requires the manufacturers of native farm wine to pass the excise tax on native farm wine on to consumers, § 28-6-4(b) levies a tax on the winemaker, not the consumer.

on all table wine and that Alabama's statutory scheme for taxing table wine discriminates against foreign wine only by virtue of the tax exemption for native farm wine created in § 28-6-4(b), Ala. Code 1975. We agree that by providing a tax exemption for native farm wine, Alabama's statutory scheme for taxing table wine discriminates against foreign wine; § 28-6-4(b), Ala. Code 1975, and the last clause of § 28-7-24, Ala. Code 1975, effect a tax scheme that discriminates against foreign wine.

Section 28-7-16, Ala. Code 1975, levies a nondiscriminatory excise tax on all table wine, and "[n]ondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'" *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 200, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994) (quoting *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 473 n. 17, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981)). We also recognize, however, that the nondiscriminatory tax, when coupled with the discriminatory exemption, violates the Commerce Clause.

In *West Lynn Creamery,* the Supreme Court of the United States considered the constitutionality of a dairy-pricing order issued by the commissioner of the Massachusetts Department of Food and Agriculture that imposed a "premium payment" on all milk dealers who sold milk to retailers in Massachusetts and that distributed the proceeds from the premium

payments to all milk producers in Massachusetts. Massachusetts argued that its dairy premium payment was levied in a nondiscriminatory fashion on all in-state and out-of-state dealers. Massachusetts also argued that the subsidy provision in the order was a legal intrastate subsidy. The Supreme Court found that the Massachusetts order "is most similar to the law at issue in *Bacchus.*" 512 U.S. at 196, 114 S.Ct. 2205. The Supreme Court stated that "[o]ur Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce." 512 U.S. at 201, 114 S.Ct. 2205. The Supreme Court held that "[t]he choice of constitutional means – nondiscriminatory tax and local subsidy – cannot guarantee the constitutionality of the program as a whole." 512 U.S. at 201, 114 S.Ct. 2205.

The trial court in this case erred because it allowed its analysis to be controlled by the form of the table-wine tax scheme. Applying the Supreme Court's rationale in *Bacchus* and *West Lynn Creamery,* we hold that the nondiscriminatory excise tax in § 28-7-16, Ala. Code 1975, considered alone, does not violate the Commerce Clause, but that Alabama's table-wine tax scheme, considered as a whole, does violate the Commerce Clause.[14]

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[14] Justice Scalia, in a concurring opinion in *West Lynn Creamery,* explains that one of the "possible devices" a state may use to discriminate against out-of-state industries is "a tax upon the industry that is nondiscriminatory in its assessment, but

(Continued on following page)

We agree with the Board that the trial court erred by striking the nondiscriminatory excise tax in the Table Wine Act and leaving intact the discriminatory language of the Native Farm Winery Act.[15] We note that in *Bacchus* the Supreme Court did not hold that Hawaii's excise tax was unconstitutional; instead, the Supreme Court held that Hawaii's scheme for taxing liquor – the excise tax coupled with the exemption – violated the Commerce Clause, and it remanded the case for the Hawaii court to consider whether to strike the nondiscriminatory

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that has an 'exemption' or 'credit' for in-state members." 512 U.S. at 210, 114 S.Ct. 2205 (Scalia, J., concurring in the judgment). Justice Scalia notes that the exemption or credit from a neutral tax has been held to be unconstitutional. 512 U.S. at 211, 114 S.Ct. 2205 (Scalia, J., concurring in the judgment).

In *Bacchus*, the exemption from Hawaii's excise tax for in-state products was part of the excise-tax statute. See *In re Bacchus Imports, Ltd.*, 65 Haw. 566, 569 n. 1, 656 P.2d 724, 726 n. 1 (1982). It is immaterial to our analysis that Alabama places the table-wine tax and the exemption from the table-wine tax in different sections of the Code.

[15] Duval argues that the "repealer clause" in § 28-7-24, Ala. Code 1975, renders the table-wine tax unconstitutional because it fails to repeal the excise-tax exemption in the Native Farm Winery Act. Section 28-7-24, Ala. Code 1975, reads, in pertinent part: "[N]othing herein contained shall be construed to repeal or as repealing Chapter 6 of this title." The fact that the Table Wine Act failed to repeal a pre-existing discriminatory tax provision in the Native Farm Winery Act does not, standing alone, render the Table Wine Act unconstitutional. Further, if the "repealer clause" is the source of the constitutional violation, the trial court could have struck merely that clause from § 28-7-24, Ala. Code 1975, and cured the constitutional defect in the Table Wine Act.

excise tax or to strike the exemption from the excise tax. 468 U.S. at 277, 104 S.Ct. 3049.[16]

Similarly in *Beskind,* the United States Court of Appeals for the Fourth Circuit deferred to the State to determine the appropriate remedy for a discriminatory regulatory scheme. In *Beskind,* out-of-state wineries challenged, under the Commerce Clause, North Carolina's prohibition on the direct sale of wine to North Carolina residents by out-of-state wineries. The trial court in *Beskind* agreed with the out-of-state wineries that North Carolina's laws prohibiting direct wine sales by out-of-state wineries violated the Commerce Clause because North Carolina permitted in-state wineries to sell wine directly to consumers. At the request of the out-of-state wineries, the trial court enjoined North Carolina from enforcing its laws prohibiting direct sales of wine to North Carolina residents by out-of-state wineries. North Carolina argued on appeal that the trial court's remedy was inappropriate and that it should be permitted to cure the discrimination against out-of-state wineries by prohibiting in-state wineries from selling wine directly to consumers. The United States Court of Appeals for the Fourth Circuit agreed with North Carolina and held: "North Carolina retains great flexibility to determine what sort of relief to provide

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[16] The Supreme Court observed that the federal constitutional issues involved likely were intertwined with state-law issues and that such questions should appropriately be addressed by the state court. 468 U.S. at 277, 104 S.Ct. 3049.

to cure the discriminatory treatment, and thus we follow North Carolina's indication of its preference." 325 F.3d at 520. Although in *Beskind* the United States Court of Appeals for the Fourth Circuit affirmed the trial court's judgment finding that North Carolina's regulatory scheme discriminated against out-of-state wineries, the Court of Appeals vacated the trial court's order enjoining North Carolina from enforcing its prohibition on direct sales by out-of-state wineries to North Carolina residents because the court determined that North Carolina's proposed remedy was sufficient to cure the discriminatory effect of its Alcoholic Beverage Control laws.

Finally, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Department of Business Regulation of Florida,* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the United States Supreme Court considered what would constitute an appropriate cure for a liquor tax that discriminated against out-of-state liquor producers. In *McKesson,* the Florida Supreme Court held that Florida's liquor-tax scheme, which discriminated against out-of-state products, violated the Commerce Clause, but it did not award refunds of illegal taxes. *McKesson* appealed, seeking a refund of illegal taxes. The United States Supreme Court held:

> "[A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested tax period

> in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the State may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme because this retention would deprive petitioner of its property pursuant to a tax scheme that is valid under the Commerce Clause. . . .
>
> "More specifically, the State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reduction that its competitors actually received. . . . Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme. . . ."

496 U.S. at 39-40, 110 S.Ct. 2238. Thus, *McKesson* teaches that a state may cure the constitutional defect in its tax scheme by ending the discriminatory tax exemption for an in-state product and taking appropriate remedial actions instead of by striking the nondiscriminatory tax on all affected products.

In this case, just as in *Beskind* and *McKesson*, the Board retains an interest in preserving the integrity of the State's regulatory scheme for alcoholic

beverages, and the trial court should defer to the Board's selection of a remedy so long as the Board's proposed remedy cures the Commerce Clause violation.[17] Therefore, we reverse the trial court's order striking § 28-7-16, Ala. Code 1975.[18]

Conclusion

We hold that because Duval challenged the constitutionality of Alabama's table-wine excise tax, and because the State has an interest in preserving the integrity of its regulatory framework for the sale and taxation of wine, the Board has standing to bring a counterclaim challenging the constitutionality of the tax exemption for native farm wine enacted in the Native Farm Winery Act. We reverse the trial court's finding that § 28-7-16, Ala. Code 1975, is unconstitutional because we find that § 28-7-16, Ala. Code 1975, standing alone, merely enacts a nondiscriminatory excise tax on table wine. We hold that Alabama's scheme of taxation for table wine embodied in the Table Wine Act read together with the Native

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[17] Duval argued that the Board failed to plead its constitutional counterclaim with sufficient specificity. We agree with the Board that Duval knew that the Native Farm Winery Act was at issue in the Board's counterclaim.

[18] We do not decide whether the trial court erred by ordering the Board to escrow the taxes collected under § 28-7-16, Ala. Code 1975, pending resolution of this appeal. Duval argued that the escrow issue will have been mooted by this Court's ruling on the constitutionality of the table-wine tax, and in its reply brief the Board agreed.

Farm Winery Act violates the Commerce Clause. We further hold that it would have been proper for the trial court to cure the constitutional defect in the tax scheme by striking the tax-exemption provision in § 28-6-4, Ala. Code 1975, and the last clause of § 28-7-24, Ala. Code 1975 (which provides that "nothing herein contained shall be construed to repeal or as repealing Chapter 6 of this title"). We remand the case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, LYONS, BROWN, JOHNSTONE, HARWOOD, WOODALL, and STUART, JJ., concur.

APPENDIX D

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

HENRI DUVAL WINERY, L.L.C.	*	
Plaintiff,	*	
VS.	*	CIVIL ACTION
ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD	*	NO. 2001-703
Defendant.	*	

AMENDED ORDER

Upon review of the opinion of the Supreme Court in this matter, it is clear that Alabama's scheme for taxation of table wine was unconstitutional. This Court also notes that the offending provision, Section 28-6-4, Code of Alabama, 1975, also has been repealed by the legislature which would appear to remedy the infirmities noted by the Supreme Court.

The Supreme Court also foreclosed the possibility of Plaintiff receiving a refund since the tax is paid by consumers and, thus, Plaintiff lacks standing. Instead, the Board will be given thirty days to effect a remedy to cure the Commerce Clause violation. *See pages 19-23 of the Supreme Court's opinion.* The Board will also clarify its position on whether Plaintiff is due an award of attorney fees.

Plaintiff contends that it should be allowed to pursue damage claims in this dispute. Once the Board's proposed remedy is unveiled, Plaintiff shall brief to the Court its position on the damage claim in light of the Supreme Court's opinion and the Board's proposed remedy.

DONE and ORDERED this 27th day of July, 2004.

/s/ Truman M. Hobbs, Jr.
TRUMAN M. HOBBS, JR.
CIRCUIT JUDGE

APPENDIX E

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

HENRI-DUVAL WINERY, L.L.C. individually and on behalf of all others similarly situated, Plaintiff,	)	
vs.	)	
ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD, STATE OF ALABAMA, RANDALL SMITH, LUCY PARSON, DR. WESLEY BARRY, JR., PHILLIP LOVELL, Defendant.	)	**CASE NO: 2001-703-GR**

ORDER

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment and the responses thereto. Present at the date and time scheduled for hearing were the attorneys for the parties. Plaintiff is seeking to have Ala. Code §28-7-16, which imposes a tax on table wines manufactured outside the State of Alabama, declared unconstitutional.

UNDISPUTED FACTS

It is undisputed that Plaintiff is a California company that manufactures table wines, some of which are sold in the State of Alabama, and that these wines are products flowing in interstate commerce. Plaintiff sells its products through a wholesaler licensed to do business in the State of Alabama who then distributes the wine to retailers. Plaintiff's wines are taxed pursuant to §28-7-16, Code, which imposes an excise tax of $.45 per liter. These wines are taxed at the point of sale to the wholesaler. The wholesaler submits monthly reports to the ABC Board and remits the appropriate excise tax charged on the wines sold.

There are currently eight native farm wineries licensed in Alabama and they are taxed differently than foreign wineries. Wines that are produced from products grown in the State of Alabama are taxed pursuant to Ala. Code. §28-6-4(b) at the rate of $.05 per gallon and are exempt from all other taxes. There are no native farm wineries that produce more than 100,000 gallons annually. The total reported sales of the eight licensed native farm wineries in fiscal year 2000 was approximately 6,000 gallons. The same wholesaler who handles Plaintiff's wines also distributes wines for native farm wineries but does not collect an excise tax for them.

CONCLUSIONS OF LAW

The regulation of native farm wines is codified in Ala. Code §28-6-1, et seq., and is known as the "Native Farm Wine Act. The regulation of foreign table wines is contained in Ala. Code 28-7-1, et seq., and is known as the "Alabama Table Wine Act".

Both "table wine" and "native table wine" are defined as wines which contain no more than 14.9 percent alcohol by volume. §28-3-1(33), Code and §28-6-1(2), Code. A native farm winery is defined as one where the annual production does not exceed 100,000 gallons and 75 percent or more of the products used in the manufacture of such wines are grown and produced in Alabama.

As stated, it is undisputed that Plaintiff's wines move in interstate commerce. State taxation of interstate commerce is permissible if that taxation does not discriminate against interstate commerce. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93 (1997). In order to determine whether a State tax on interstate commerce is discriminatory, the subject tax as well as the taxing scheme relating to the product must be considered.

Although there are several cases which this Court finds to be dispositive of the constitutionality issue, it finds that *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263 (1984), is particularly applicable. In that case the Supreme Court of the United States found that a Hawaii excise tax imposed on sales of alcoholic

beverage at wholesale was discriminatory because certain locally produced alcoholic beverages were exempted from the tax. This Court finds no significant difference in the tax scheme here and the tax structure in *Bacchus*.

And in *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), it was held that Alabama's differential treatment of imposing an additional fee on out-of-state waste violated the Commerce Clause. More recently, in *South Central Bell Telephone Company v. Alabama*, 526 U.S. 160 (1999), the U.S. Supreme Court found that a franchise tax assessed on foreign corporations that was higher than the tax imposed on domestic firms discriminated against foreign firms and violated the Commerce Clause.

Having carefully reviewed the excise tax imposed under §28-7-16, Code, and applicable law, this Court finds this statute is discriminatory, that it violates the Commerce Clause and it is unconstitutional.

With regard to Defendants' alternative argument that in the event the Court declares any statute unconstitutional, it should be the Native Farm Wine Act, §28-6-1, et seq., Code. These statutes do not regulate interstate commerce but rather intrastate commerce and would not be subject to the Commerce Clause. Furthermore, Defendants who consist of the ABC Board, Board members and the administrator of the ABC Board, do not have standing to contest the constitutionality of the Native Farm Wine Act.

Finally, Plaintiff has moved to strike Defendants' Second Amendment To Answer and the Court is of the opinion that this answer has no bearing on the constitutional issue addressed in this order and, therefore, it does not find it necessary to address the matters raised in it at this time.

Wherefore, it is hereby ORDERED as follows:

1. That the Motion For Partial Summary Judgment filed by the Plaintiff is GRANTED and the tax imposed by Ala. Code 1975 §28-7-16 is hereby declared to be in violation of the Commerce Clause, U.S.C.A. Const., Article 1, 58, cl. 3. That pursuant to Rule 54(b), A.R.C.P. the Court finds no just reason for delay and specifically enters final judgment in declaring Ala. Code 1975 §28-7-16 unconstitutional.

2. That Defendants are hereby enjoined from further collection of any taxes imposed under Ala. Code 1975, §28-7-16, after 12:00 midnight on September 28, 2001. That any taxes collected after the date of this order shall be held in escrow pending further order of this Court.

3. That Defendants shall take whatever action is necessary to notify all persons and/or entities responsible for the collection and remittance of this tax and that it shall not be collected in accordance with this order.

4. That Plaintiff's Motion to Strike that portion of the affidavit of Randall Smith based on his belief is granted.

5. That this Court specifically reserves jurisdiction over the remaining issues, including class certification and remedy issues, and a scheduling conference is set on for October 10, at 11:30 a.m.

Done this 17th day of September, 2001.

s/ SALLY GREENHAW
SALLY GREENHAW
CIRCUIT JUDGE

cc: Counsel of Record

APPENDIX F

IN THE SUPREME COURT OF ALABAMA

June 19, 2009

1070257 Henri-Duval Winery, L.L.C. v. Alabama Alcoholic Beverage Control Board et al.

(Appeal from Montgomery Circuit Court: CV-01-703).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on June 19, 2009:

Application Overruled. No Opinion. Bolin, J. – Stuart, Smith, Parker, and Shaw, JJ., concur. Lyons, Woodall, and Murdock, JJ., dissent. Cobb, C.J., recuses herself.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on May 1, 2009:

Affirmed. No Opinion. Bolin, J. – Stuart, Smith, Parker, and Shaw, JJ., concur. Lyons, Woodall, and Murdock, J J., concur in part and dissent in part. Cobb, C.J., recuses herself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered

by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 19th day of June, 2009.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX G

HB58

1. HB58 ACT NO. 2001-1114
2. 44056-4
3. By Representative Newton (D)
4. RFD: Ways and Means General Fund
5. First Read: 11-DEC-2001

Enrolled, An Act,

Relating to the production, sale and taxation of table wine; to provide further for the taxation and distribution of the proceeds thereof to the state, counties, and municipalities; to provide further for the sale at retail and dispensation of wine samples by table wine manufacturers; to repeal Sections 28-6-1 to 28-6-6, inclusive, and Section 28-7-16, Code of Alabama 1975; to enact a new Section 28-7-16, to amend Sections 28-7-18, Code of Alabama 1975; and to provide for a retroactive effect.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA: Section 1. Sections 28-6-1 to 28-6-6, inclusive, Code of Alabama 1975, are repealed.

Section 2. The existing Section 28-7-16, Code of Alabama 1975, is repealed.

Section 3. The replacement Section 28-7-16 is added to the Code of Alabama 1975, to read as follows:

§28-7-16.

(a) Levy. There is hereby levied in addition to the license taxes provided for by this chapter and municipal and county license taxes and in addition to any marked-up price made by the board on wine sold by the board a privilege or excise tax measured by and graduated in accordance with the volume of sales of table wine and shall be an amount equal to $.45 per liter of table wine sold to the wholesale licensee or board, to be collected from the purchaser by the board or by a licensed retailer.

(b) Collection, Monthly Return, Remittance, Right to Examine Books and Records. (1) The tax levied by subsection (a) of this section shall be added to the sales price of all table wine sold and shall be collected from the purchasers. The tax shall be collected in the first instance from the wholesaler where table wine is sold or handled by wholesale licensees, and by the board from whomever makes sales when table wine is sold by the board. It shall be unlawful for any person who is required to pay the tax in the first instance to fail or refuse to add to the sales price and collect from purchaser the required amount of tax, it being the intent and purpose of this provision that the tax levied is in fact a levy on the consumer. The person who pays the tax in the first instance is acting as an agent of the state for the collection and payment of the tax and as such may not collect a tax on table wine for any other level of government.

(2) The tax hereby levied shall be collected by a monthly return, which shall be filed by the wholesale licensee as follows: A monthly return filed with the board not later than the 15th day of the second month following the month of receipt of table wine by the wholesaler on a form prescribed by the board showing receipts by the wholesalers from manufacturer, importer, or other wholesaler licensees during the month of receipt and the taxes due thereon at the rate of $.38 per liter of table wine sold to the wholesale licensee or board; the taxes due at such rate shall be remitted to the board along with the return; a monthly return filed with the county or municipality within which the wine is sold at retail filed not later than the 15th day of each month showing sales by wholesalers during the preceding month and the county or municipality in which sold and the taxes due thereon at the rate of $.07 per liter of table wine sold; and the taxes due at such rate shall be remitted to the county or municipality along with the return.

(3) The tax hereby levied shall be collected by the board on the table wine sold by the board and shall be paid as follows: Taxes at the rate of $.38 per liter of table wine sold shall be remitted by the board to the State Treasurer and taxes at the rate of $.07 per liter of table wine sold shall be remitted by the board to the county or municipality within which the wine was sold at retail not later than the last day of the month following the month of sale, as set forth in subsection (c) of this section.

(4) The board and the governing body of each county and municipality served by the wholesaler shall have the authority to examine the books and records of any person who sells, stores, or receives for the purpose of distribution any table wine, to determine the accuracy of any return required to be filed with it.

(c) Disposition of proceeds. The proceeds of the tax levied by subsection (a) of this section shall be paid and Distributed as follows:

(1) Thirty-eight cents ($.38) per liter of table wine sold shall be collected by the board on its sales or paid to the board by wholesale licensees on their sales, and by the board paid to the State Treasurer to be credited as net profits from operation of the board to be distributed as provided by law.

(2) Seven cents ($.07) per liter of table wine sold shall be paid by the board on its sales or by wholesale licensees on their sales, either into the treasury of the municipality in which the table wine was sold at retail within its corporate limits, or, where sold outside the corporate limits of any municipality, into the treasury of the county in which the table wine was sold at retail.

(d) Tax exclusive. The tax herein levied is exclusive and shall be in lieu of all other and additional taxes and licenses of the state, county or municipality, imposed on or measured by the sale or volume of sale of table wine; provided, that nothing herein contained shall be construed to exempt the retail sale

of table wine from the levy of tax on general retail sales by the state, county, or municipality in the nature of, or in lieu of, a general sales tax.

(e) Trade between wholesalers exempt. The tax levied by subsection (a) of this section shall not be imposed upon the sale, trade, or barter of table wine by one licensed wholesaler to another wholesaler licensed to sell and handle table wine in this state, which transaction is hereby made exempt from said tax; provided, however, the board may require written reporting of any such transaction in the form as the board may prescribe.

Section 4. Section 28-7-18, Code of Alabama 1975, is Amended to read as follows:

"§28-7-18.

"(*a*) No manufacturer shall sell any table wine direct to any retailer or for consumption on the premises where sold, nor sell or deliver any such table wine in other than original containers, nor shall any manufacturer maintain or operate within this state any place or places, other than the place or places covered by his or its license where table wine is sold or where orders therefor are taken. Provided, further, that table wine which is manufactured in Alabama ~~where 75 percent or more of the fruit or produce used in the manufacture of such wine is grown in Alabama~~, may be sold directly at retail by the licensed manufacturer only on the manufacturer's premises, for on-premise or off-premise consumption.

"(b)(1) There is hereby levied and assessed, upon wine manufactured in Alabama and sold by the manufacturer directly at retail on the premises where it is manufactured, as provided in subsection (a), or dispensed, as free samples of not more than six ounces, in the tasting room or wine cellar on the manufacturer's premises, an excise tax, measured by and graduated in accordance with the volume of such wine sold or dispensed, in an amount equal to forty-five cents ($.45) per liter.

"(2) The tax hereby levied on retail sales on a manufacturer's premises shall be added to the sales price of all table wine sold at retail by the manufacturer, as provided in subsection (a) of this section, and shall be collected from the consumers making the purchases.

"(c) The tax levied by subsection (b) of this section shall be collected by a return and remitted, monthly, as follows:

"(1) Not later than the fifteenth day of the month following the month in which table wine was dispensed as free samples or sold at retail as provided in subsection (a) of this section, the manufacturer shall file with the board, a return form and in the manner prescribed by the board, a return showing taxes due at thirty-eight cents ($.38) per liter of the table wine dispensed or sold at retail during the previous month; the taxes due at such rate shall be remitted to the board along with the return.

"(2) Not later than the fifteenth day of the month following the month in which table wine was dispensed as free samples or sold at retail as provided in subsection (a) of this section, the manufacturer shall file with the municipality within which the table wine was dispensed or sold at retail within its corporate limits, or, where dispensed or sold at retail outside of the corporate limits of any municipality, with the county within which the table wine was dispensed or sold at retail, a return showing taxes at seven cents ($.07) per liter of the table wine dispensed or sold at retail during the previous month; the taxes due at such rate shall be remitted to the county or municipality along with the return.

"(3) All taxes imposed, levied and collected under this section shall be deposited and credited in the same manner as are other table wine taxes.

"(d) Manufacturers who manufacture table wine within Alabama shall provide to the board monthly reports, in the form, time, and manner prescribed by the board, reporting gallonage sold and gallonage exported for Sale outside the state during the previous month.

"(e) The tax herein levied is exclusive and shall be in lieu of all other and additional taxes of the state, county, and municipality imposed on or measured by the sale or volume of sale of table wine; provided that nothing herein contained shall be construed to exempt the retail sale of table wine from the levy of tax on general retail sales by the state, county, or municipality in the nature of, or in lieu of, a general sales tax."

Section 5. (a) The provisions of Sections 1 and 2 of this act shall be effective September 30, 2001.

(b) The provisions of Sections 3 and 4 of this act shall be effective October 1, 2001.

(c) It is the intent of the Legislature that this act be construed as retroactive. Because the levy, amount, collection, and disposition of proceeds of table wine tax under this act is the same as that under Section 28-7-16, Code of Alabama 1975, which is repealed by Section 2, herein, the requirements for payment of table wine tax under replacement Section 28-7-16, which is hereby enacted, the liability for which had been incurred from October 1, 2001 to the date this act becomes a law, may be met by transferring to the board and to the proper municipal and county governments, their pro rata share of the taxes collected and paid into escrow under the order of the Circuit Court of Montgomery County, Alabama in the case of *Henri-Duval Winery, L.L.C. v Alabama Alcoholic Beverage Control Board, et al,* case number CV-2001-703. In the event that such transfer is not made by order of the court, then wholesale licensees may satisfy the said requirements either by assigning their respective interests in the said escrow to the board and the proper municipal and county governments or by paying like amounts to the board and to municipal and county governments.

Section 6. The provisions of this act are severable. If any part of this act is declared invalid or

unconstitutional, that declaration shall not affect the part which remains.

Section 7. This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.

/s/ Seth Hammett

Speaker of the House of Representatives

/s/ Steve Windom

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House 19-DEC-2001, as amended.

Greg Pappas
Clerk

Senate 21-DEC-2001 Passed

APPROVED 12/28/01
TIME 10:31 AM
/s/ Don Siegelman
GOVERNOR

Alabama Secretary of State
Act Num...: 2001-1114
Bill Num...: H-58
Recv'd 12/28/01 01:56pmHMB

APPENDIX H

Ala.Code 1975 § 28-6-4 (repealed 2001) provided:

§ 28-6-4. Privilege license tax imposed; excise tax levied; exception; monthly report and remittance; application to import fruit, etc., when not available; deposit of taxes.

(a) Upon every manufacturer holding a license for the production of native farm wine, there is hereby levied and imposed for the privilege of engaging in the manufacture of native farm wine an annual privilege license tax in the amount of $25.00 which shall be paid to the board.

(b) There is hereby levied and assed an excise tax upon each case of native farm wine sold by a manufacturer to any source to be collected from the manufacturer in an amount equal to $.05 per gallon. However, native farm wine produced in Alabama for export and sale without this state shall not be subject to said excise tax, but such tax shall accrue or be collected on native farm wines dispensed, as free samples in quantities of not more than six ounces, in the tasting room or wine cellar of a native farm winery. The excise tax provided for in this section shall be in lieu of all other taxes imposed.

(c) The privilege tax imposed by subsection (a) of this section shall be collected in the same manner as presently provided by law for the collection of other taxes on alcoholic beverages. The excise tax imposed by subsection (b) of this section shall be reported monthly by the producer to the board on all sales

made in Alabama to the board, retailers, consumers or any alcoholic beverage permit holder of the board, along with a statement of gallonage produced during that month, and the producer shall remit the tax due and owing with each report. The producer shall also include in the report a statement of gallonage sold and exported for sale outside of this state.

(d) Provided that such fruit, produce or honey used in the manufacture of native Alabama wine is not available in Alabama due to an act of God, the holder of a farm winery permit may apply to the Alabama Alcoholic Beverage Control Board for permission to import such produce.

(e) All taxes imposed, levied and collected under this section shall be deposited in the same manner as are other taxes collected by the board. (Acts 1979, No. 79-182, p. 291, § 4.)

Ala.Code 1975 § 28-7-24 provided:

§ 28-7-24. Repealer; application of certain taxes.

All laws or parts of laws which conflict or are inconsistent with this chapter are hereby repealed. The taxes imposed by Sections 28-3-200, 28-3-201, 28-3-202, 28-3-203 and 28-3-204 do not apply to the sale of table wine; provided, that, nothing herein contained shall be construed to relieve any person from any tax liability, penalty or forfeiture incurred thereunder or under any local tax, county or municipal,

hereby repealed, nor be construed to repeal any provision of law respecting the enforcement of any such tax liability, penalty or forfeiture incurred; provided further, that nothing herein contained shall be construed to repeal or as repealing Chapter 6 of this title. (Acts 1980, No. 80-382, p. 505, §25.)

Ala.Code 1975 § 28-7-16 (repealed 2001) provided:

§ 28-7-16. Tax on sale of table wine; amount; collection; disposition of proceeds; exclusive; exemption.

(a) Levy. – There is hereby levied in addition to the license taxes provided for by this chapter and municipal and county licenses taxes and in addition to any marked-up price made by the board on wine sold by the board a privilege or excise tax measured by and graduated in accordance with the volume of sales of table wine and shall be an amount equal to $.45 per liter of table wine sold to the wholesale licensee or board, to be collected from the purchaser by the board or by a licensed retailer.

(b) Collection. – The tax levied by subsection (a) of this section shall be added to the sales price of all table wine sold and shall be collected from the purchasers. The tax shall be collected in the first instance from the wholesaler where table wine is sold or handled by wholesale licensees, and by the board from whomever makes sales when table wine is sold by the board. It shall be unlawful for any person who

is required to pay the tax in the first instance to fail or refuse to add to the sales price and collect from purchaser the required amount of tax, it being the intent and purpose of this provision that the tax levied is in fact a levy on the consumer. The person who pays the tax in the first instance is acting as an agent of the state for the collection and payment of the tax and as such may not collect a tax on table wine for any other level of government.

The tax hereby levied shall be collected by a monthly return, which shall be filed by the wholesale licensees as follows: a monthly return filed with the board not later than the fifteenth day of the second month following the month of receipt of table wine by the wholesaler on a form prescribed by the board showing receipts by the wholesalers from manufacturer, importer or other wholesaler licensees during the month of receipt and the taxes due thereon at the rate of $.38 per liter of table wine sold to the wholesale licensee or board; and the taxes due at such rate shall be remitted to the board along with the return; a monthly return filed with the county or municipality within which the wine is sold at retail filed not later than the fifteenth day of each month showing sales by wholesalers during the preceding month and the county or municipality in which sold and the taxes due thereon at the rate of $.07 per liter of table wine sold; and the taxes due at such rate shall be remitted to the county or municipality along with the return.

The tax hereby levied shall be collected by the board on the table wine sold by the board and shall be paid

as follows: taxes at the rate of $.38 per liter of table wine sold shall be remitted by the board into the State Treasury and taxes at the rate of $.07 per liter of table wine sold shall be remitted by the board to the county or municipality within which the wine was sold at retail not later than the last day of the month following the month of sale, as set forth in subsection (c) of this section.

The board and the governing body of each county and municipality served by the wholesaler shall have the authority to examine the books and records of any person who sells, stores or receives for the purpose of distribution any table wine, to determine the accuracy of any return required to be filed with it.

(c) Disposition of proceeds. – The proceeds of the tax levied by subsection (a) of this section shall be paid and distributed as follows:

(1) Thirty-eight cents per liter of table wine sold shall be collected by the board on its sales or paid to the board by wholesale licensees on their sales, and by the board paid into the State Treasury to be credited as net profits from operation of the board to be distributed as provided by law.

(2) Seven cents per liter of table wine sold shall be paid by the board on its sales or by wholesale licensees on their sales, either into the treasury of the municipality in which the table wine was sold at retail within its corporate limits, or, where sold outside the corporate limits of any municipality, into

the treasury of the county in which the table wine was sold at retail.

(d) Tax exclusive. – The tax herein levied is exclusive and shall be in lieu of all other and additional taxes and licenses of the state, county or municipality, imposed on or measured by the sale or volume of sale of table wine; provided, that nothing herein contained shall be construed to exempt the retail sale of table wine from the levy of tax on general retail sales by the state, county or municipality in the nature of, or in lieu of, a general sales tax.

(e) Trade between wholesalers exempt. – The tax levied by subsection (a) of this section shall not be imposed upon the sale, trade or barter of table wine by one licensed wholesaler to another wholesaler licensed to sell and handle table wine in this state, which transaction is hereby made exempt from said tax; provided, however, the board may require written reporting of any such transaction in such form as the board may prescribe. (Acts 1980, No. 80-382, p. 505, § 16; Acts 1983, No. 83-594, p. 927, §1.)

Ala.Code 1975 § 28-6-3 (repealed 2001) provided:

§ 28-6-3. To whom sales authorized.

Every native farm winery is hereby authorized to make sales to the board, directly to consumers for off-premises consumption, to alcoholic beverage permit holders of the board, including but not limited to wholesale dealers and distributors, stores, hotels,

restaurants, clubs, dining cars and to any producer, manufacturer, wholesaler, retailer or consumer located outside the State of Alabama. (Acts 1979, No. 79-182, p. 291, §3.)

Ala.Code 1975 § 28-7-18 (repealed 2001) provided:

§ 28-7-18. Sales by manufacturers.

No manufacturer shall sell any table wine direct to any retailer or for consumption on the premises where sold, nor sell or deliver any such table wine in other than original containers, nor shall any manufacturer maintain or operate within this state any place or places, other than the place or places covered by his or its license where table wine is sold or where orders therefor are taken. Provided, further, that table wine which is manufactured in Alabama where 75 percent or more of the fruit or produce used in the manufacture of such wine is grown in Alabama, may be sold directly at retail by the licensed manufacturer only on the manufacturer's premises, for on-premise or off-premise consumption. (Acts 1980, No. 80-382, p. 505, § 18.)

Ala.Code 1975 § 28-3-1 provided:

§ 28-3-1. Definitions.

The following words or phrases, whenever they appear in this chapter, and in Alcoholic Beverage Licensing Code, being Act No. 80-529, Acts of Alabama,

1980, as amended, appearing as Chapter 3A, Title 28, as amended, and the Alabama Table Wine Act, being Act 80-382, Acts of Alabama 1980, as amended, appearing as Chapter 7, Title 28, as amended, unless the context clearly indicates otherwise, shall have the meaning ascribed to them in this section:

(1) ALCOHOLIC BEVERAGES. Any alcoholic, spirituous, vinous, fermented or other alcoholic beverage, or combination of liquors and mixed liquor, a part of which is spirituous, vinous, fermented or otherwise alcoholic, and all drinks or drinkable liquids, preparations or mixtures intended for beverage purposes, which contain one-half of one percent or more of alcohol by volume, and shall include liquor, beer, and wine, both fortified and table wine.

(2) ASSOCIATION. A partnership, limited partnership, or any form of unincorporated enterprise owned by two or more persons.

(3) BEER, OR MALT OR BREWED BEVERAGES. Any beer, lager beer, ale, porter, malt or brewed beverage, or similar fermented malt liquor containing one-half of one percent or more of alcohol by volume and not in excess of five percent alcohol by weight and six percent by volume, by whatever name the same may be called.

(4) BOARD. The Alcoholic Beverage Control Board.

(5) CARTON. The package or container or containers in which alcoholic beverages are

originally packaged for shipment to market by the manufacturer or its designated representatives or the importer.

(6) CONTAINER. The single bottle, can, keg, bag or other receptacle, not a carton, in which alcoholic beverages are originally packaged for the market by the manufacturer or importer and from which the alcoholic beverage is consumed by or dispensed to the public.

(7) CLUB.

a. Class I. A corporation or association organized or formed in good faith by authority of law and which must have at least 150 paid-up members. It must be the owner, lessee or occupant of an establishment operated solely for the objects of a national, social, patriotic, political or athletic nature or the like, but not for pecuniary gain, and the property as well as the advantages of which, belong to all the members and which maintains an establishment provided with special space and accommodations where, in consideration of payment, food with or without lodging is habitually served. The club shall hold regular meetings, continue its business through officers regularly elected, admit members by written application, investigation and ballot and charge

and collect dues from elected members.

b. Class II. A corporation or association organized or formed in good faith by authority of law and which must have at least 100 paid-up members. It must be the owner, lessee or occupant of an establishment operated solely for the objects of a national, social, patriotic, political or athletic nature or the like. The club shall hold regular meetings, continue its business through officers regularly elected, admit members by written application, investigation and ballot and charge and collect dues from elected members.

(8) CORPORATION. A corporation or joint stock association organized under the laws of this state, the United States, or any other state, territory or foreign country, or dependency.

(9) DRY COUNTY. Any county which by a majority of those voting voted in the negative in an election heretofore held under the applicable statutes at the time of said election or may hereafter vote in the negative in an election or special method referendum hereafter held in accordance with the provisions of Chapter 2 of this title, or held in accordance with the provisions of any act hereafter enacted permitting such election.

(10) DRY MUNICIPALITY. Any municipality within a wet county which has, by its governing body or by a majority of those voting in a municipal election heretofore held in accordance with the provisions of Section 28-2-22, or in a municipal option election heretofore or hereafter held in accordance with the provisions of Act 84-408, Acts of Alabama 1984, appearing as Chapter 2A of this title, or any act hereafter enacted permitting municipal option election, voted to exclude the sale of alcoholic beverages within the corporate limits of said municipality.

(11) GENERAL WELFARE PURPOSES.

a. The administration of public assistance as set out in Sections 38-2-5 and 38-4-1;

b. Services, including supplementation and supplementary services under the federal Social Security Act, to or on behalf of persons to whom such public assistance may be given under said Sections 38-2-5 and 38-4-1;

c. Service to and on behalf of dependent, neglected or delinquent children; and

d. Investigative and referral services to and on behalf of needy persons.

(12) HEARING COMMISSION. A body appointed by the board to hear and decide all contested license applications and all disciplinary charges against any licensee for

violation of this title or the regulations of the board.

(13) HOTEL. A building or buildings held out to the public for housing accommodations of travelers or transients, and shall include motel, but shall not include a rooming house or boarding house.

(14) IMPORTER. Any person, association or corporation engaged in importing alcoholic beverages, liquor, wine or beer, manufactured outside of the United States of America into this state or for sale or distribution in this state, or to the board or to a licensee of the board.

(15) LIQUOR. Any alcoholic, spirituous, vinous, fermented, or other alcoholic beverage, or combination of liquors and mixed liquor, a part of which is spirituous, fermented, vinous or otherwise alcoholic, and all drinks or drinkable liquids, preparations or mixtures intended for beverage purposes, which contain one-half of one percent or more of alcohol by volume, except beer and table wine.

(16) LIQUOR STORE. A liquor store operated by the board, where alcoholic beverages other than beer are authorized to be sold in unopened containers.

(17) MANUFACTURER. Any person, association or corporation engaged in the producing, bottling, manufacturing, distilling,

rectifying or compounding of alcoholic beverages, liquor, beer or wine in this state or for sale or distribution in this state or to the board or to a licensee of the board.

(18) MINOR. Any person under 21 years of age, except a person 19 years of age or older prior to October 1, 1985, is not a minor; provided, however, in the event Section 28-1-5, shall be repealed or otherwise shall be no longer in effect, thereafter the provisions of Section 26-1-1, shall govern.

(19) MUNICIPALITY. Any incorporated city or town of this state to include its police jurisdiction.

(20) PERSON. Every natural person, association or corporation. Whenever used in a clause prescribing or imposing a fine or imprisonment, or both, such term as applied to "association" shall mean the partners or members thereof and as applied to "corporation" shall mean the officers thereof, except as to incorporated clubs the term "person" shall mean such individual or individuals who, under the bylaws of such clubs, shall have jurisdiction over the possession and sale of liquor therein.

(21) POPULATION. The population according to the last preceding or any subsequent decennial census of the United States, except where a municipality is incorporated subsequent to the last census, in which event, its population until the next decennial census shall be the population of said municipality

as determined by the judge of probate of said county as the official population on the date of its incorporation.

(22) RESTAURANT. A reputable place licensed as a restaurant, operated by a responsible person of good reputation and habitually and principally used for the purpose of preparing and serving meals for the public to consume on the premises.

(23) MEAL. A diversified selection of food some of which is not susceptible of being consumed in the absence of at least some articles of tableware and which cannot be conveniently consumed while one is standing or walking about.

(24) RETAILER. Any person licensed by the board to engage in the retail sale of any alcoholic beverages to the consumer.

(25) SALE OR SELL. Any transfer of liquor, wine or beer for a consideration, and any gift in connection with, or as a part of, a transfer of property other than liquor, wine or beer for a consideration.

(26) SELLING PRICE. The total marked-up price of spirituous or vinous liquors sold by the board, exclusive of taxes levied thereon.

(27) UNOPENED CONTAINER. A container containing alcoholic beverages, which has not been opened or unsealed subsequent to filling and sealing by the manufacturer or importer.

(28) WET COUNTY. Any county which by a majority of those voting voted in the affirmative in an election heretofore held in accordance with the statutes applicable at the time of said election or may hereafter vote in the affirmative in an election or special method referendum held in accordance with the provisions of Chapter 2 of this title, or other statutes applicable at the time of said election.

(29) WET MUNICIPALITY. Any municipality in a dry county which by a majority of those voting voted in the affirmative in a municipal option election heretofore or hereafter held in accordance with the provisions of Act 84-408, Acts of Alabama 1984, appearing as Chapter 2A of this title, as amended, or any act hereafter enacted permitting municipal option election, or any municipality which became wet by vote of the governing body or by the voters of the municipality heretofore or hereafter held under the special method referendum provisions of Section 28-2-22, or as hereafter provided, where the county has become dry subsequent to the elected wet status of the municipality.

(30) WHOLESALER. Any person licensed by the board to engage in the sale and distribution of table wine and beer, or either of them, within this state, at wholesale only, to be sold by export or to retail licensees or other wholesale licensees or others within this state lawfully authorized to sell table

wine and beer, or either of them, for the purpose of resale only.

(31) WINE. All beverages made from the fermentation of fruits, berries, or grapes, with or without added spirits, and produced in accordance with the laws and regulations of the United States, containing not more than 24 per cent alcohol by volume, and shall include all sparkling wines, carbonated wines, special natural wines, rectified wines, vermouths, vinous beverages, vinous liquors, and like products, including restored or unrestored pure condensed juice.

(32) FORTIFIED WINE OR VINOUS LIQUOR. Any wine containing more than 14.9 percent alcohol by volume but not more than 24 percent. Fortified wine is vinous liquor.

(33) TABLE WINE. Any wine containing not more than 14.9 percent alcohol by volume. Table wine is not liquor, spirituous or vinous.

(34) BRANDY. All beverages which are an alcoholic distillate from the fermented juice, mash, or wine of fruit, or from the residue thereof, produced in such manner that the distillate possesses the taste, aroma, and characteristics generally attributed to the beverage, as bottled at not less than 80 degree proof. (Acts 1936-37, Ex. Sess., No. 66, p. 40; Code 1940, T.29, §§ 1, 60; Acts 1967, No. 301, p. 839; Acts 1986, No. 86-212, p. 264, § 1; Acts 1991, No. 91-211, p. 393, § 1;

Acts 1997, No. 97-419, p. 704, § 1; Act 98-505, § 1.)

Ala.Code 1975 § 28-6-1 provided:

§ 28-6-1. Definitions.

When used in this chapter, the following words and phrases shall have the following meanings, respectively, unless the context clearly indicates otherwise:

(1) NATIVE FARM WINERY. A winery where the annual production does not exceed 100,000 gallons, and 75 percent or more of the berries, fruit, produce or honey used in the manufacture of such wine is grown and produced in Alabama by the native farm winery permit holder upon land owned or leased by the permit holder in the vicinity of his farm winery.

(2) NATIVE FARM WINE. Any product having an alcohol content not to exceed 14.9 percent by volume and made in accordance with the revenue laws of the United States, which is produced on a native farm winery.

(3) PERSON. One or more natural persons, or a corporation, partnership or association.

(4) BOARD. The Alabama Alcoholic Beverage Control Board. (Acts 1979, No. 79-182, p. 291, § 1; Act 98-505, p. 1171, § 1.)

RULE 54(b)
ALABAMA RULES OF CIVIL PROCEDURE

Rule 54. Judgments; Costs

(b) **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Except where judgment is entered as to defendants who have been served pursuant to Rule 4(f), in the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

APPENDIX I

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR MONTGOMERY COUNTY
MONTGOMERY, ALABAMA

HENRI-DUVAL WINERY, LLC.	)	
PLAINTIFF,	)	
VS	)	CIVIL ACTION
ALABAMA ABC BOARD, ET AL.,	)	NO. 01-703
DEFENDANT.	)	

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, SEPTEMBER 19, 2007

MONTGOMERY COUNTY COURTHOUSE
COURTROOM 3-A

BEFORE: THE HON. TRUMAN M. HOBBS, JR.
CIRCUIT JUDGE

APPEARANCES

FOR THE PLF:

DOYLE FULLER, ESQUIRE
MONTGOMERY, ALABAMA

FOR THE DEFENDANT:

JAMES ANDERSON, ESQUIRE
MONTGOMERY, ALABAMA

JUDY E. SHELTON
OFFICIAL REPORTER

[2] THE COURT: Have a seat. Who wants to ruin my afternoon first?

MR. ANDERSON: That would be me. Actually, Judge, I think we are going to make things better. We have got some stipulations that – where we are in the status of this case. Those are – this relates back – the law was changed effective the 1st of October of 2001. We have agreed that prior to October 1st, 2001, immediately prior to, there were seven native farm wineries that were licensed in Alabama. That was Braswell's Winery in Dora, Alabama, the Bryant Vineyard in Talladega.

THE COURT: A little too tart for me.

MR. ANDERSON: Right. It was a crimson wine, I think. The Future Enterprises – it is better. Future Enterprise Cellular Master Vineyard in Knoxville, Alabama. I think that is an orange wine. The Morgan Creek Winery in Harpersville, the –

[3] MR. FULLER: That's the one run by Morgan David.

MR. ANDERSON: Morgan David's cousin, Morgan Creek. The Perdido Vineyards in Perdido, Alabama, Silver Hill Vineyards in Silver Hill, Alabama, and the White Winds Farms in Montevallo, Alabama.

(Off-the-record Discussion.)

MR. ANDERSON: Three of these vineyards, Future Enterprises and Silver Hill and White

Winds, never reported any production or paid any taxes. Those three – and Braswell's Winery did not renew their licenses after October 1, 2001. Morgan Creek's first license was for the year before October 1, 2000 to – September 30, 2000. So we only operated on the native wine tax for one year.

There were two vineyards that operated. I had some numbers that Doyle would not stipulate to as to what was the difference between what was collected and what would have been collected.

We have stipulated to what I [4] have told you before. Doyle does not stipulate that the difference, if it had been the table wine rather than the native wine, Morgan Creek –

MR. FULLER: Let me say. He wants to make a showing of those fees. I object to them going into the record too. I don't stipulate to them.

MR. ANDERSON: Morgan Creek, it would have been a two thousand five hundred forty dollar eighty-eight cent difference. Then the Braswell's Winery would have been a hundred fifty-three dollars and sixty-eight cents. The Bryant Vineyards, one thousand six hundred three dollars and fifty-one cents.

THE COURT: What is that, a hundred sixty-three?

MR. ANDERSON: I'm sorry. One thousand six hundred three. Fifty-one for Bryant.

THE COURT: Okay.

MR. ANDERSON: And Perdido Vineyards was one thousand eight oh two [5] twenty-two. Now the ABC Board has not collected any table wine taxes from these vineyards –

MR. FULLER: Or their customers.

MR. ANDERSON: – or their customers from any persons prior – for any of the periods prior to October the 1st, 2001. Since that time, of course that native farm wine tax has been repealed. So we have not collected from any person, from anyone, the difference between the table wine and what the native wine would have been. So there has been – there has been no collection from those at that time.

Now one of the things that Doyle and I talked about, and I believe – if the statute is different. I believe the statute of limitations for going back and collecting a back tax is three years.

MR. FULLER: At the outside, it is five years, both of which have now expired. But the longest possible time [6] is five years.

MR. ANDERSON: Some of these vineyards ceased to do business and ceased to be operated before we had the ruling from the Supreme Court.

MR. FULLER: And the rest of them when they lost.

THE COURT: They just got tired of bringing all the Napa Valley vineyards to their knees.

MR. ANDERSON: Right. I don't know if you need anything, Susan

MR. FULLER: There is one other thing, if I can step in. There has been no refund of any table wine taxes to anyone for table wine taxes collected on sales of what I will call foreign wines, wines produced outside the state, for the period of time preceding October 1, 2001.

MR. ANDERSON: That's right.

MR. FULLER: In other words, there has been no refund to anyone of the higher tax and no collection of the difference between the low tax and the [7] high tax.

MR. ANDERSON: And this is all from a period prior to October 1, 2001.

MR. FULLER: The tax was equalized effective that date, Judge, as you will recall.

THE COURT: Okay.

(Off-the-record discussion)

THE COURT: So where are we, guys?

MR. FULLER: Well, Judge –

THE COURT: I want to get rid of this case.

MR. FULLER: Well, I do too but I put too much work in it. But we have got what I call the marketing scheme aspect of this case that is left that you have made no ruling on. Now the evidence that

we have just stipulated to, I have been trying to get for some time. In that interim, between the time I asked for it and time I have got it, you dismissed my claims as to the tax but I do want to take that up. What I would ask the Court to do is let me file [8] another motion based on this evidence to reconsider that ruling. Then you do whatever you think is appropriate but at least let me procedurally get my record right so that I can seek a review of it, if I decide to do so.

THE COURT: Okay.

MR. ANDERSON: And we have no trouble with that, Judge.

MR. FULLER: My suggestion is on the other aspect of the case –

THE COURT: The marketing scheme aspect?

MR. FULLER: Yes, sir. Do you recall what that is?

THE COURT: I have no idea. I try to forget this case every time you walk out that door.

MR. FULLER: Prior to October 1, local wineries were allowed to sell their products directly to the consuming public or directly to retailers. They were allowed to bypass the wholesalers. Out of state wineries were able to sell only to wholesalers. There was no [9] vehicle by which they could sell direct to the consumer or direct to retailers.

Effective October 1, they changed that to some extent. Local wineries, however, are still allowed to sell directly to the consuming public from sales made on their own premises. That is not – I will be honest with you. That is not a big discrimination anymore.

THE COURT: It never was.

MR. ANDERSON: I told Doyle it was mainly to underage people.

MR. FULLER: This issue, Judge, has been all the way to the U.S. Supreme Court on this marketing scheme discrimination. In a case called Grand Home and Swedenburg (sic), the U.S. Supreme Court ruled that those kind of restrictions that allowed local wineries to sell – to bypass the middleman while requiring out of state wineries to deal with the middleman is unconstitutional. I sent you a copy of the opinion sometime back.

[10] So we have that to deal with. Now here is, I think, the easy way to deal with it.

THE COURT: Here is what you need to do. As soon as this case is over, you need to go find somebody – get one of the Alabama wine makers to sue the state of California because all those wine makers in California are selling their wine on the premises directly to customers, and I guarantee your little Alabama wine maker can't do that. What we are going to wind up doing for your clients is shutting down any direct sale of wine to the public anywhere.

MR. FULLER: No, sir.

THE COURT: Yes.

MR. FULLER: I'm not –

THE COURT: This is just absurd.

MR. FULLER: I'm not complaining about that. I am complaining about the requiring of out-of-state wineries to have to absorb the cost of dealing with wholesalers in order to sell [11] their wines. A local winery could sell it straight to Winn Dixie. A California winery could not. He had to sell it to a wholesaler who then made another profit and then sold it to the retailers.

THE COURT: So you are saying the local guy, he doesn't have to go through a wholesaler. He can sell directly to Winn Dixie?

MR. FULLER: That's right. He did prior to October 1.

MR. ANDERSON: Prior to October 1.

MR. FULLER: Now he can't. That is why I just pointed out to you. Now he can sell directly to the consumer but only from his own premises. So that is not a problem because California wineries are not going to come open a store here anyway. If they come and open a winery here, then they are no longer a foreign winery. But the real problem is the cost of having to deal with the wholesaler.

THE COURT: Okay.

[12] MR. FULLER: The U.S. Supreme Court said that added cost of having to deal with the wholesaler brings about an unconstitutional discrimination. That is what it said in the Swedenburg case.

THE COURT: Okay.

MR. ANDERSON: Judge, I think probably the simplest thing to do and the posture that it is in with the stipulations – and again, I have no objection with that being on the record. If you dismiss this case, we will take it up another time.

MR. FULLER: Let me get it procedurally correct.

(Off-the-Record Discussion.)

MR. ANDERSON: If there is no claim there. We say there is no claim.

MR. FULLER: That's right

THE COURT: I will look at your marketing scheme, and file your motion to reconsider.

MR. FULLER: All right.

[13] CERTIFICATE

STATE OF ALABAMA)
COUNTY OF MONTGOMERY)

I, JUDY E. SHELTON, OFFICIAL COURT REPORTER IN AND FOR THE FIFTEENTH

JUDICIAL CIRCUIT, MONTGOMERY COUNTY, ALABAMA, DO HEREBY CERTIFY THAT I REPORTED IN MACHINE SHORTHAND THE FOREGOING HEARING AS STATED IN THE CAPTION HEREOF; THAT MY SHORTHAND NOTES WERE LATER TRANSCRIBED BY ME OR UNDER MY SUPERVISION, AND THAT THE FOREGOING PAGES REPRESENT A FULL, TRUE AND CORRECT TRANSCRIPT OF SAID PROCEEDINGS; THAT I AM NEITHER KIN NOR OF COUNSEL TO ANY PARTIES IN THIS PROCEEDING NOR IN ANY WAY INTERESTED IN THE RESULTS THEREOF.

DATED THIS THE 29TH DAY OF JANUARY, 2008.

s/ Judy E. Shelton
JUDY E. SHELTON
OFFICIAL COURT REPORTER

APPENDIX J

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-2001-703

HENRI-DUVALL WINERY, L.L.C., individually And on behalf of all others similarily situated,

Plaintiff,

v.

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD, STATE OF ALABAMA, RANDALL SMITH, Individually and in his capacity as Administrator of the Alabama Alcoholic Beverage Control Board, LUCY PARSONS, individually and in her capacity as Chairman of the Alabama Alcoholic Beverage Control Board, DR. WESLEY BARRY, JR., and PHILLIP LOVELL, individually and in their capacity as members of the Alabama Alcoholic Beverage Control Board;

Defendants.

COMPLAINT

INTRODUCTION

1. The Plaintiff brings this action seeking declaratory and injunctive relief, a refund, and other

appropriate relief on behalf of itself and as a class representative for all others similarly situated. The action is brought challenging the constitutionality of the provisions of Code of Alabama, Sec. 28-7-16(a) and (b), "Alabama Table Wine Act," which imposes an excise tax of $.45 per liter on all table wine imported through interstate commerce into the State of Alabama.

2. The class sought to be represented by the Plaintiff are all persons or entities who have imported and/or sold imported table wine in the State of Alabama from October 1, 1980, until the present.

THE PARTIES

3. Henri-Duvall Winery, L.L.C. is a producer and manufacturer of table wines which are produced in the State of California which are imported into the State of Alabama for ultimate retail sale.

4. Defendant Alabama Alcoholic Beverage Control Board is the agency of the State of Alabama charged with the duty and responsibility of enforcing all laws relating to the distribution, sale, and consumption of alcoholic beverages within the State of Alabama, including but not limited to collecting the tax placed on alcoholic beverages, which is the subject of this action.

5. Defendant Randall Smith is the Administrator of the Alabama Alcoholic Beverage Control Board (henceforth ABC Board) and is responsible for the day-to-day operations of the ABC Board. Defendant Randall Smith is sued in his individual and official capacity.

6. Defendant Lucy Parsons is Chairman of the ABC Board and is sued in her individual and official capacity.

7. Defendants Dr. Wesley Barry, Jr. and Phillip Lovell are members of the ABC Board and are sued in their individual and official capacity.

FACTS

8. In 1979, the Legislature of the State of Alabama passed Act No. 79-182, known as the "Native Farm Winery Act" and codified as § 28-6-1 through 28-6-6, Code of Alabama, 1975, as amended. The excise tax on native farm wine is set forth in § 28-6-4(b), Code of Alabama, 1975, as follows:

> "(b) There is hereby levied and assessed an excise tax upon each case of native farm wine sold by a manufacturer to any source to be collected from the manufacturer in an amount equal to $.05 per gallon. However, native farm wine produced in Alabama for export and sale without this state shall not be subject to said excise tax, but such tax shall accrue to be collected on native farm wines dispensed, as free samples in quantities of not more than six ounces, in the tasting room or wine cellar of a native farm winery. The excise tax provided for in this section shall be in lieu of all other taxes imposed."

9. In 1980, the Legislature of the State of Alabama passed Act. No. 80-382, known as the "Alabama Table Wine Act" and codified as § 28-7-1 through § 28-7-24, Code of Alabama, 1975, as amended. The excise tax on table wine was levied by § 28-7-16(a), Code of Alabama, as amended which provides:

> "(a) Levy. – There is hereby levied in addition to the license taxes provided for by this chapter and municipal and county license taxes and in addition to any marked-up price made by the board on wine sold by the board a privilege or excise tax measured by and graduated in accordance with the volume of sales of table wine and shall be an amount equal to $.45 per liter of table wine sold to the wholesale licensee or board, to be collected from the purchaser by the board or by a licensed retailer."

Collection of said tax is provided per § 28-7-16(b), Code of Alabama, 1975, which reads in pertinent part as follows:

> "(b) Collection. – The tax levied by subsection (a) of this section shall be added to the sales price of all table wine sold and shall be collected from the purchasers. The tax shall be collected in the first instance from the wholesaler where table wine is sold or handled by wholesale licensees, and by the board from whomever makes sales when table wine is sold by the board. It shall be unlawful

> for any person who is required to pay the tax in the first instance to fail to refuse to add to the sales price and collect from purchaser the required amount of tax, it being the intent and purpose of this provision that the tax levied is in fact a levy on the consumer. The person who pays the tax in the first instance is acting as an agent of the state for the collection and payment of the tax and as such may not collect a tax on table wine for any other level of government."

10. Plaintiff, Henri-Duvall Winery, L.L.C., manufacturers table wines at wineries in the State of California. It's wines are imported for sale in the State of Alabama, and hence, solely because the wines of the Plaintiff are manufactured outside the State of Alabama, are penalized to the extent of approximately $.40 per liter in its ultimate cost to the consumer in Alabama. This penalty amounts to an unconstitutional infringement upon the free flow of commerce under Act 1, Section 8 of the U.S. Constitution. The wines of all other out of state manufacturers or producers are similarily taxed in a discriminating manner.

11. It is established by the Constitution of the United States in Article I, Section 8, clause 3, and Section 10, clause 2 as follows:

"Section 8"

> "The congress shall have power to lay and collect taxes, duties, imposts and excise, to pay the debts and provided for the common defense and general welfare

of the United States; but all duties, imposts and excises shall be uniform throughout the United States.;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

. . . (Emphasis added)

"Section 10"

"No state shall, without consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and exports, laid by any state on imports or exports, shall be for the use of the treasury of the United States; all such laws shall be subject to the revision and control of the congress."

12. In 1984, the Supreme Court of the United States decided the case of Bacchus Imports, L.T.D., et al. v. Dias, Director of Taxation of Hawaii, 468 U.S. 263, 104 S. Ct. 3049 (1984). In Bacchus, the State of Hawaii imposed a 20% excise tax on sales of liquor sold at wholesale within the State. However, to encourage the development of the Hawaiian liquor industry, "okolehao", a brandy distilled exclusively from the root of an indigenous shrub of Hawaii, as well as fruit wine manufactured solely in Hawaii were expressly exempt from the tax by state law. The U.S. Supreme Court held that the State tax exemption had both the purpose and effect of discriminating

in favor of local Hawaiian products. The Commerce Clause limits the manner in which any state may legitimately compete for interstate trade, for in the process of competition, no state may discriminatorily tax products manufactured in any other state. The Bacchus Court, in rejecting the Hawaiian tax scheme, held that the Hawaiian tax exemption was not saved by the Twenty-First Amendment. The Hawaiian tax exemption violates a central tenet of the Commerce Clause, but is not supported by any clear concern of the Twenty-First Amendment in combating the evils of an unrestricted traffic in liquor. The Bacchus Court held that the central purpose of the Twenty-First Amendment was not to empower states to favor their local liquor industry by erecting barriers to competition.

CLASS ACTION ALLEGATIONS

13. The Plaintiff brings these claims on behalf of itself and all members of the class composed of all producers, manufacturers, importers and distributors of table wines imported into the State of Alabama and sold therein.

14. The Plaintiff makes the following allegations and averments with regard to the propriety of maintaining this action as a class action:

    A. That the class is so numerous that joinder of all members is impractical;

B. That there are questions of law and questions of fact common to the class;

C. That its claims are typical of the claims of the entire class which arise from the same operative facts and are based on the same legal theories;

D. That in its representative capacity it will fairly and adequately protect the interest of the class;

E. That prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants herein;

F. That the Defendants have acted or refused to act on grounds legally applicable to the class, thereby making appropriate final relief with respect to the class as a whole;

G. That questions of law and fact common to the members of the class predominate over any questions effecting only individual members, and that a class action is superior to other available methods for the fair and effective adjudication of this controversy.

H. That the Plaintiff has retained counsel experienced in handling class actions and other actions which have claims similar to those expressed in this complaint. Neither the Plaintiff nor its counsel have any interests which might cause them not to vigorously pursue this action.

15. Plaintiff, Henri-Duvall Winery, L.L.C., brings this action on behalf of itself, and all others similarly situated, and pursuant to Rule 23, Alabama Rules of Civil Procedure, as a class action on behalf of all the entities who have sold and/or imported table wine in the State of Alabama from October 1, 1980 until the present. Plaintiff, Henri-Duvall Winery, L.L.C., avers that there are questions of law and/or fact common to the class. Plaintiff further avers that its claims as a representative of the class are typical of claims of other members of the class. Plaintiff further avers that in its representative capacity it will fairly and adequately protect the interest of other members of the class.

16. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Plaintiff further avers that the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class. Plaintiff further avers that the prosecution of individual

actions would be cost prohibitive and involve substantial court time to decide the same issues time and time again.

WHEREFORE, premises considered, the Plaintiffs request this Honorable Court to enter an Order in accordance with the Alabama Rules of Civil Procedure, allowing this cause to be maintained as a class action and further that this Court will enter such other orders as may be necessary and proper under the premises.

COUNT I

17. The allegations of paragraphs 1 through 14 are incorporated herein as if fully set forth below.

18. Plaintiff, Henri-Duvall Winery, L.L.C., individually and on behalf of the members of the class, alleges and avers that the Defendants, acting under color of state law, violated Article I, Section 8, Clause 3 and Section 10, Clause 2, of the Constitution of the United States, the Commerce Clause, by imposing and collecting an excise tax of $.45 per liter on all table wine produced outside and imported into the State of Alabama for sale to consumers, while imposing and collecting an excise tax of only $.05 per gallon on all "native farm wine" produced exclusively within the borders and confines of the State of Alabama for sale to consumers.

19. Plaintiff, Henri-Duvall Winery, L.L.C., individually and on behalf of the members of the class, avers and alleges that officials of the Alabama

ABC Board, the Legislature of the State of Alabama and other public officials of the State of Alabama were and continue to be aware that said excise tax of $.45 per liter on table wine produced outside the State of Alabama and sold to consumers in the State of Alabama violated the Commerce Clause and other provisions of the United States Constitution and that they willfully, intentionally, and/or recklessly failed to take the necessary action to enforce the Constitution of the United States.

20. Plaintiff, Henri-Duvall Winery, L.L.C., individually and on behalf of the members of the class, avers and alleges that due to the willful, intentional and/or reckless failure of the appropriate state officials to take the necessary action to enforce the Constitution of the United States, that it and others similarly situated who imported table wine into Alabama were and continue to be damaged by the unconstitutional Alabama excise tax.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Henri-Duvall Winery, L.L.C., individually and on behalf of the members of the class, demands judgment against Defendants, jointly, severally, and in the alternative for:

a. A declaratory judgment holding that Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, are unlawful, unconstitutional and void insofar as they impose and provide for the collection of an excise tax on table wine imported into the State of

Alabama by Plaintiff and all members of the Plaintiff's class which is greater than similar taxes imposed on such wines produced in Alabama;

b. A permanent injunction restraining and enjoining the collection of the table wine tax established by Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, by Defendants and persons within their jurisdiction, authority, and control, and restraining Defendants and all other persons acting in authority from enforcement or execution of any provisions of Sections 28-7-16(a) and (b), Code of Alabama, 1975, as amended, against Plaintiff and all or any other members of the Plaintiff's class;

c. An order directing a cy pres refund, or other similar remedy, of any taxes or penalties wrongfully, illegally or unconstitutionally collected in for excise taxes on imported table wines for all periods of illegal collection;

d. Attorneys' fees as provided under 42 U.S.C. Sec. 1988 and other laws;

e. All lawful costs and expenses of this action; and

f. Such other and further relief as the Court may deem just and equitable.

Plaintiff further prays that the Court will enter an order for a speedy hearing of this cause and will advance this cause on the Court's calendar pursuant to Rule 57, Alabama Rules of Civil Procedure.

COUNT II

21. The allegations of paragraphs 1 through 18 are incorporated herein as if fully set forth below.

22. By virtue of the aforementioned conduct, the Defendants seeks to impose an excise tax for revenue purposes upon wines imported into the State of Alabama for sale to consumers that is higher than the excise tax on wines produced in the State of Alabama for sale to consumers.

23. Such disparate treatment of citizens and non-citizens of Alabama violates protections guaranteed by Article IV, Section 2 of the United States Constitution, which afford the citizens of each state all privileges and immunities enjoyed by citizens of their states.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Henri-Duvall Winery, L.L.C., individually and on behalf of the members of the class, demands judgment against Defendants, jointly, severally, and in the alternative for:

a. A declaratory judgment holding that Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, are unlawful, unconstitutional and void insofar as they impose and provide for the collection of an excise tax on

table wine imported into the State of Alabama from plaintiff and all members of the Plaintiff's class which is greater than similar taxes imposed on such wines produced in Alabama;

b. A permanent injunction restraining and enjoining the collection of the table wine tax established by Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, by Defendants and persons within their jurisdiction, authority, and control, and restraining Defendants and all other persons acting in authority from enforcement or execution of any provisions of Sections 28-7-16(a) and (b), Code of Alabama, 1975, as amended, against Plaintiff and all or any other members of the Plaintiff's class;

c. An order directing a cy pres refund, or other similar remedy, of any taxes or penalties wrongfully, illegally or unconstitutionally collected in excise taxes on imported table wines for all periods of illegal collection;

d. Attorneys' fees as provided under 42 U.S.C. Sec. 1988 and other laws;

e. All lawful costs and expenses of this action; and

f. Such other and further relief as the Court may deem just and equitable.

Plaintiff further pray that the Court will enter an order for a speedy hearing of this cause and will advance this cause on the Court's calendar pursuant to Rule 57, Alabama Rules of Civil Procedure.

COUNT III

24. The allegations of paragraphs 1 through 21 are incorporated herein as if fully set forth below.

25. The excise tax on imported table wines constitutes an impermissible discrimination against the Plaintiff and members of the Plaintiff's class by creating an unfair classification based upon Plaintiff being an importer of table wines from outside the State of Alabama and thereby deprives it of the right to due process and equal protection under the law pursuant to the Fifth and Fourteenth Amendments of the United States constitution.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Henri-Duvall Winery, L.L.C., individually and on behalf of the members of the class, demands judgment against Defendants, jointly, severally, and in the alternative for:

a. A declaratory judgment holding that Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, are unlawful, unconstitutional and void insofar as they impose and provide for the collection of an excise tax of $.45 per liter on table wine imported into the State of Alabama from

Plaintiff and all members of the Plaintiff's class which is greater than similar taxes imposed on such wines produced in Alabama;

b. A permanent injunction restraining and enjoining the collection of the $.45 per liter table wine tax established by Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, by Defendants and persons within their jurisdiction, authority, and control, and restraining Defendants and all other persons acting in authority from enforcement or execution of any provisions of Sections 28-7-16(a) and (b), Code of Alabama, 1975, as amended, against Plaintiff and all or any other members of the Plaintiff's class;

c. An order directing a cy pres refund, or other similar remedy, of any taxes or penalties wrongfully, illegally or unconstitutionally collected in excise taxes on imported table wines for all periods of illegal collection;

d. Attorneys' fees as provided under 42 U.S.C. Sec. 1988 and other laws;

e. All lawful costs and expenses of this action; and

f. Such other and further relief as the Court may deem just and equitable.

Plaintiff further prays that the Court will enter an order for a speedy hearing of this cause and will advance this cause on the Court's calendar pursuant to Rule 57, Alabama Rules of Civil Procedure.

COUNT IV

26. The allegations of paragraphs 1 through 23 are incorporated herein as if fully set forth below.

27. The action of Defendants set out herein are under color of state law, custom and usage and deprive Plaintiff and members of the Plaintiff's class of rights secured to them by the Constitution and laws of the United States. Defendants are therefore liable to Plaintiff pursuant to 42 U.S.C. Sec. 1983.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Henri-Duvall Winery, L.L.C., individually and on behalf of the members of the class, demands judgment against Defendants, jointly, severally, and in the alternative for:

a. A declaratory judgment holding that Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, are unlawful, unconstitutional and void insofar as they impose and provide for the collection of an excise tax on table wine imported into the State of Alabama by Plaintiff and all members of the Plaintiff's class which is greater than similar taxes imposed on such wines produced in Alabama;

b. A permanent injunction restraining and enjoining the collection of the table wine tax established by Sections 28-7-16(a) and (b), Code of Alabama 1975, as amended, by Defendants and persons within their jurisdiction, authority, and control, and restraining Defendants and all other persons acting in authority from enforcement or execution of any provisions of Sections 28-7-16(a) and (b), Code of Alabama, 1975, as amended;

c. An order directing a cy pres refund, or other similar remedy of any taxes or penalties wrongfully, illegally or unconstitutionally collected in excise taxes on imported table wines for all periods of illegal collection;

d. Attorneys' fees as provided under 42 U.S.C. Sec. 1988 and other laws;

e. All lawful costs and expenses of this action; and

f. Such other and further relief as the Court may deem just and equitable.

Plaintiff further pray that the Court will enter an order for a speedy hearing of this cause and will advance this cause on the Court's calendar pursuant to Rule 57, Alabama Rules of Civil Procedure.

Respectfully submitted this the 9th day of March 2001.

/s/ J. Doyle Fuller
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Attorneys for Plaintiff Henri-Duvall Winery, L.L.C.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-2001-703

HENRI-DUVALL WINERY, L.L.C., individually And on behalf of all others similarily situated,

Plaintiff,

v.

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD, STATE OF ALABAMA, RANDALL SMITH, Individually and in his capacity as Administrator of the Alabama Alcoholic Beverage Control Board, LUCY PARSONS, individually and in her capacity as Chairman of the Alabama Alcoholic Beverage Control Board, DR. WESLEY BARRY, JR., and PHILLIP LOVELL, individually and in their capacity as members of the Alabama Alcoholic Beverage Control Board;

Defendants.

FIRST AMENDED COMPLAINT

Comes now the Plaintiff and hereby amends the Complaint heretofore filed in this cause in the following manner:

A. The Plaintiff's name, through a scriber's error, was incorrectly stated as "Henri Duval Winnery, L.L.C." when in fact the Plaintiff's true name is "Henri Duval Wine Company, L.L.C.". The Plaintiff, therefore amends the Complaint to correctly state its name as "Henri Duval Wine Company, L.L.C.".

B. By adding the following as Count V:

COUNT V

27. The allegations of the previous paragraphs are hereby adopted.

28. Under various provisions of Alabama law the Plaintiff and members of its class are forebidden to sell their wines to anyone other than licensed importers, wholesalers, or other manufacturers. Specifically they are forbidden to sell at retain or directly to retail sellers. For instance, see Ala. Code 1975 §28-1-4, §28-3A-6, and §28-7-18.

29. At the same time Alabama law treats the manufacturers of what is known as "Native Farm Wines" (Ala. Code §§28-6-1 et seq.) and table wines manufactured in Alabama from fruit or produce, 75% of which is grown in Alabama (Ala.Code §28-7-18) differently in that these wine manufacturers are allowed to sell their wines in Alabama directly at retail.

30. The Plaintiff contends that such discriminatory treatment is violative of the provisions of Act 1, Section 8 of the U.S. Constitution (The Commerce Clause) and as such denies to the Plaintiff and its class, equal protection and due process of

law under the U.S. Constitution. Hence this cause is actionable under 42 USC §1983 in this case and since the Defendants at all times have been acting under color of State law.

31. As a direct and proximate result of the discriminatory treatment of the Plaintiff and its class, the Plaintiff and its class have suffered damage.

Wherefore, the Plaintiff demands judgment on behalf of itself and its class in the following respects:

A. Declaring any and all statutory or regulatory restrictions on the retail sales of the products of the Plaintiff and its class with the State of Alabama, to be void.

B. Order the Defendants to repay to the Plaintiff and its class all monitory losses they have sustained as a result of this discriminatory treatment, together with interest to the date of judgment.

C. Appropriate attorneys fees and costs as allowed by law, and

D. Such other and different relief appropriate under the premises.

In all other respects the Complaint as originally filed remains unchanged.

Respectfully submitted this the 18th day of April 2001.

/s/ J. Doyle Fuller
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Attorneys for Plaintiff
Henri Duvall Wine Company, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing First Amended Complaint by placing a copy of same in the United States Mail, first-class postage prepaid to the following:

William H. Pryor, Esq.
Attorney General
11 S. Union Street, Room 303
Montgomery, Alabama 36130

James H. Anderson, Esq.
Beers, Anderson, Jackson, Nelson, Hughes & Patty
250 Commerce St., Suite 100
P. O. Box 1988
Montgomery, Alabama 36102

Done this the 18th day of April 2001.

/s/ J. Doyle Fuller
J. DOYLE FULLER

APPENDIX K

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

HENRI-DUVAL WINERY, L.L.C., individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	CASE NO: CV-2001-703-GR
vs.	)	
ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD, et al.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO AMENDED ORDER OF JULY 27, 2004

COME NOW the Defendants in the above styled action and respond to the this Court's Amended Order of July 27, 2004, as follows:

Upon reviewing the opinion of the Alabama Supreme Court in this matter, it appears that the Legislature has effected the remedy suggested by the Supreme Court by repealing the Native Wine Tax and implementing a revised Table Wine Tax. The Defendants believe that no damages have been suffered by any party in this matter. If any damage has been sustained, it has been to the State of Alabama by not collecting the proper taxes. The Alabama Alcoholic

Beverage Control Board believes the proper remedy to be effected is to collect the difference between the Table Wine Tax and the Native Farm Wine Tax. After reviewing the applicable law, it is the opinion of the Board that it may only collect taxes due for three years prior to an order of this Court approving the remedy.

The Board also believes that the Plaintiff is not due an award of attorneys fee. However, after the Court issued its Amended Order of July 27, 2004, the Plaintiff moved this Court to make an award of interim attorneys' fee in this action. Duval argues that such an award should be made under the "Common Benefit" exception to the "American Rule." Such awards have been made in cases such as *Brown v. State,* 565 So.2d 585 (Ala. 1990) and *Ex parte Horn,* 718 So.2d 694 (Ala. 1998). The Defendants believe such an award would be improper in this matter.

Plaintiff avers that due to the initiation of this particular case, the Alabama Legislature was compelled to enact Act #2001-114 which repealed Ala. Code § 28-7-16 (1975) of the Table Wine Act, and the entire Native Farm Wine Act, Ala. Code § 28-6-1, et seq. (1975), and replaced both with a new Ala. Code § 28-7-16, which imposes an excise tax of $.45 per liter on all table wine (the same tax as the former Ala. Code § 28-7-16 provided). The Defendants acknowledge that this case, *Henri-Duval Winery. L.L.C., v. Alabama ABC Board,* CV-2001-703-GR, was the impetus which caused the Legislature to change the statutory tax scheme for table wine sold in Alabama.

In its motion, the Plaintiff states that it is well established law in Alabama that " . . . when, through pertinent litigation, lawyers succeed in bringing about a change in the law, especially a change which correct an illegality in the law, those lawyers are entitled to an award of attorneys fee." (emphasis added.) The Defendants disagree. The more proper statement of the law in Alabama regarding the application of the Common Benefit exception is found in *The Advertiser Co. v. Auburn University*, 579 So.2d 645 (Ala.Civ.App. 1991), a case cited by the Plaintiff in its motion:

> Despite the numerous decisions of this and other courts recognizing equitable exceptions to the American rule regarding attorney's fees, we do not read *Brown*[1] (or more recently. Bell[2]) to mean that in every instance where a "common benefit" arguably accrues to the general public because of actions of the plaintiff, attorney's fees must be taxed as costs. Although such awards are authorized, they are not, of course, compelled.

579 So.2d 645, 647 (Ala.Civ.App. 1991) (citations omitted.) The Advertiser Court further stated, "At the outset we note that the decision to award or deny attorney's fees lies within the sound discretion of the trial court." *Id.* at 647. The Defendants believe that

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[1] *Brown v. State*, 565 So.2d 585 (Ala. 1990).

[2] *Bell v. Birmingham News Co.*, 576 So.2d 669 (Ala.Civ.App. 1991).

are several reasons why the Plaintiffs motion for interim attorneys fees are due to be denied.

I. The Plaintiff's Actions Have Not Bestowed a Common Benefit on the Citizens of Alabama.

In order for the trial judge to even consider whether to award attorneys fees based on the Common Benefit exception, it first must be shown that the Plaintiff bestowed a common benefit on the general public in addition to serving the interests of the plaintiff. *Ex parte Horn,* 718 So.2d 694, 702 (Ala. 1998). The Plaintiff argues that "[e]nding a practice by the State of Alabama that is in clear violation of the U.S. Constitution, is most certainly a public benefit." However, because something is a public benefit does not mean it is a benefit to the general public. A survey of Alabama case law is replete with examples of incidences where courts have found that there was no benefit to the general public of this state.

An example of such a case *The Advertiser Co. v. Auburn University,* 579 So.2d 645 (Ala. 1991). In *The Advertiser*, Auburn hired the Atlanta law firm of King & Spalding to investigate possible improprieties involving its Executive Director of Alumni and Development who served as well as both the Secretary of the Auburn University Foundation and the executor of the estate of an significant Auburn benefactor. Auburn refused to make public the King & Spalding report. The *Advertiser* filed a declaratory judgment

action asking the Court to declare the report a public document subject to disclosure under the Open Records Act. Summary judgment was entered in favor of the *Advertiser*. The Advertiser then moved to have its attorneys fees taxed against Auburn under the Common Benefit exception. The trial court denied that motion, which the Alabama Supreme Court affirmed even though the *Advertiser* had arguably had bestowed a "common benefit" on the general public. In affirming the trial court, the Supreme Court noted that the award of attorneys fees under the Common Benefit Exception is in the sole discretion of the trial judge, and that such awards are merely authorized, not compelled by law. 579 So.2d 645, 647.

In *State Dept. of Revenue v. Calhoun*, 792 So.2d 373 (Ala.Civ.App. 1998) (affirmed in part, reversed in part, 792 So.2d 380)[3], a taxpayer filed a complaint and a notice of appeal of a final assessment by the Department of Revenue of the taxpayer's oil and gas privilege tax. The trial court ruled that the Alabama's Taxpayers' Bill of Rights, Ala. Code § 40-2A-l et seq., applies retroactively. The Plaintiff then argued that attorneys fees should be awarded because he had bestowed a benefit on Alabama taxpayers by his argument that the Department was required to abide by the provisions of the Taxpayers' Bill of Rights. The

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[3] The Supreme Court reversed the Court of Civil Appeals' holding that the Taxpayer's Bill of Rights applies retroactively while affirming the denial of attorneys fees. *Ex parte State Dept. of Revenue*, 792 So.2d 380 (Ala. 1999).

trial court denied this motion. In affirming the trial court, the Court of Civil Appeals noted that "although a 'common benefit' might be inferred from the result of this case, we note that Calhoun has made no specific showing of such a benefit." 792 So.2d at 379.

In a case almost identical to the case *sub judice*, the Alabama Supreme Court held that the City of Pelham was not entitled to an award of attorneys fees in a lawsuit against the ABC Board under the Common Benefit exception. *Alabama Alcoholic Beverage Control Board v. City of Pelham,* 855 So2d. 1070 (Ala. 2003). In *City of Pelham*, the City filed a declaratory judgment action challenging the distribution of net profits from the ABC Board, claiming the Board was violating the formula provided in ALA. CODE § 28-3-74. The City of Pelham also sought a certification of a class of other designated beneficiaries under § 28-3-74, injunctive relief, and retroactive damages based on the allegedly improperly diverted revenues.

While the lawsuit was pending, Act No. 2001-891, became effective, which "purportedly operated retrospectively to cure the alleged improper distributions for the fiscal years 1990 through 2002 and prospectively changed the allocation of revenues in excess of $2,200,00 for each year beginning October 1, 2002." 855 So.2d at 1075.

The trial court granted summary judgment in favor of the City of Pelham and held that the City had been deprived of statutorily earmarked funds by the improper distribution of revenue in violation of

§ 28-3-74. However, the trial court held that the City was not entitled to retroactive monetary relief due to the 2001 Act and sovereign immunity.[4] In granting summary judgment, the trial court awarded attorneys fees to the City of Pelham based upon the Common Benefit exception.

The Supreme Court reversed the award of attorneys fees. In doing so, the Court opined:

> We agree with the City that this litigation precipitated the 2001 Act. Under the 2001 Act, the Board's net profits was replaced by a permanent change in the distribution of those profits. Although the 2001 Act prohibited future transfers made in general appropriation acts, it reduced the percentage allocated to the City and increased the percentage allocated to the State general fund. Even if we were to conclude that the 2001 Act bestowed a benefit upon the City, where is the benefit to the general public? . . . If the City did confer a benefit on itself, it was at the expense of the general public for whose

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[4] Supreme Court affirmed this issue only on the 2001 Act. The Court wrote: "The trial court denied monetary relief to the City because it held that the State defendants were entitled to State immunity. However, because we can affirm a trial court's judgment "if it is right on any ground developed in, and supported by, the record," we affirm the trial court's judgment insofar as it denied monetary relief to the City based upon the validity of the 2001 Act." 855 So.2d 1070,1083.

> benefit the Legislature passes the general appropriation acts.

855 So.2d at 1084-1085.

Thus the question is raised in this case, where is the benefit to the general public? Henri-Duval and other out of state wineries can no longer argue they are at a competitive disadvantage (although it is hard to make the argument that Alabama wine "competes" with other wines for sales.) But how does that benefit the general populace of Alabama? This lawsuit has not caused the cost of wine to decrease. In fact, for those few who actually buy wine produced in Alabama, the cost of such wine may increase due to the increased tax . The wineries of Alabama will have to pay back taxes. The Plaintiff may argue that the state is receiving more revenue from the increased tax on wine produced in Alabama. However, given the historical sale of wine produced in Alabama, this will amount to approximately $8,250.00 per year. This represents a minuscule amount compared to the FY 2005 General Fund Budget. Thus, the benefit to the State or its people is no greater than the benefit in *Alabama Alcoholic Beverage Control Board v. City of Pelham*, 855 So2d. 1070 (Ala.2003).

The cases referred to by the Plaintiff in its motion can easily be distinguished from the pending matter. *Brown v. State,* 865 So.2d 585 (Ala. 1990), and *Bell v. The Birmingham News Co.*, 576 So.2d 669 (Ala.Civ.App. 1991), involve incidences where a state actor was knowingly circumventing and/or violating

state law. In *Ex parte Horn,* 718 So.2d 694 (Ala. 1998), the City of Birmingham issued a special use exception to zoning without a public hearing or city approval as required by the zoning ordinance. In the present matter, the ABC Board collected taxes in accordance with the state law. There is no evidence they acted in bad faith in upholding the laws of this state.

From a legal aspect, the implementation of a new nondiscriminative tax scheme is a good thing. From a practical aspect, it has virtually no impact on the general public. No substantial income will be derived from this tax change for the General Fund. The price of wine will not decrease for the consumer in Alabama. Thus, no benefit has been bestowed on the general public. Therefore, attorneys fees should not be awarded based upon the Common Benefit Exception to the American Rule.

II. Any Benefit Bestowed on the General Public by the Plaintiffs Litigation Is Outweighed by the Detriment Created by the Award of Attorneys Fees.

Even if a plaintiff through litigation bestows a common benefit on the general public, the detriment created by awarding attorneys fees may outweigh the benefit bestowed by the Plaintiffs actions. The Supreme Court reversed the lower court's award of attorneys fees under the Common Benefit exception in *State Board of Education v. Waldrop,* 840 So.2d

893 (Ala. 2002). In *Waldrop*, the Plaintiff, a public school teacher, was successful in a suit claiming that portions of the Foundation Program Fund Act, Ala. Code § 16-13-230 et seq. constituted an equal protection violation pursuant to 42 U.S.C. §1983. The trial court awarded attorneys fees under the Common Benefit Exception. In reversing the trial court, the Supreme Court opined:

> Finally, even if we attributed some tangential benefit to the Board as a result of the amendment to the Foundation Act, the Board would be required to pay Waldrop's attorneys fees from its annual budget. That money is allocated to the Board for the purpose of educating children enrolled in Alabama's public schools. Thus, any award of attorney fees against the Board reduces the funds available for that purpose. We cannot conclude that Waldrop's litigation benefitted all children enrolled in Alabama's public schools to the level required to justify an attorney-fee award under the common-benefit exception. *The benefit, if any, inuring to the Board and the children enrolled in public schools as a result of Waldrop's lawsuit is more than offset by the reduction in funds that would be available for public education if the Board were required to pay the attorneys fees.*

840 So.2d 893,901-902. (emphasis added).

The remedy proposed in this case is for Alabama to collect the arrearage in the Table Wine Tax. Revenues generated from the taxing of alcohol and the

sale of alcohol in ABC stores go in the State's General Fund which greatly aids the financial condition of this state. These revenues help Alabama operate. By awarding attorneys fees, revenue will go into the Plaintiffs attorneys pockets instead of the General Fund. Moreover, those with wineries in Alabama are having to pay more taxes. When the average citizen of Alabama purchases a bottle of wine produced in Alabama, he or she will now have to pay more. This begs the question, where is the common benefit bestowed on the common citizenry of this State?

Therefore, the Plaintiffs motion for interim attorneys fees is due to be denied.

III. The Plaintiff Should Not Receive Attorneys Fees Because it Was Not Successful in its Litigation.

Another reason the Plaintiff should not receive Attorneys Fees is because it was unsuccessful in its litigation. The trial court granted partial summary judgment in favor of the Plaintiff, holding that the Local Wine Tax was constitutional and the Table Wine Tax was unconstitutional. The Alabama Supreme Court reversed the trial court in *Alabama Alcoholic Beverage Control Board v. Henri-Duval Winery. L.L.C.*, 2003 WL 22151441 (Ala. 9/19/2003).

Alabama Courts have held where the Plaintiff has failed in the litigation attorneys fees need not be awarded. In *Ex parte State Department of Revenue*, 792 So.2d 380 (Ala. 1999), the Supreme Court stated,

"Given our holding that the Circuit Court erroneously entered the summary judgment for the taxpayer, it is clear that the taxpayer it not entitled to an award of attorneys fees on the basis that he has bestowed a common benefit on all taxpayers similarly situated." 792 So.2d at 384.

In *Lee v. Baldwin County Electric Membership Corporation,* 853 So.2d 946 (Ala. 2003), the plaintiffs made a argument very similar to that which the Plaintiff is now making. Initially, the plaintiffs asked the trial court to declare the legality or illegality of a vote-by-mail resolution. Later, the plaintiffs asserted that the statute which enabled the adoption of the vote-by-mail resolution was unconstitutional and thus the vote-by-mail resolution was void. The trial court declined to hold the statute unconstitutional and the vote-by-mail resolution void and entered summary judgment in favor of the electric cooperative. In other words, the plaintiffs lost.

The plaintiffs then asked for attorneys fees under the Common Benefit exception, claiming they conferred a common benefit by precipitating a declaration of the validity of the vote-by-mail resolution. The trial court granted their motion. The Supreme Court reversed. In doing so, the Supreme Court cited the case of *Allen v. Lloyd's of London,* 975 F.Supp. 802 (E.D.Va.1997). In *Allen,* the unsuccessful litigants sought a similar reading of the term "benefit." They argued that they had obtained "'timely guidance' on the important and disputed issue whether the Equitas interests that Lloyd's was offering to the

[unsuccessful litigants] were securities under the securities laws of the United States, so that [the unsuccessful litigants] could properly evaluate the nature and status of the investment they were being offered." 853 So.2d at 953, quoting 975 F.Supp. at 809. The Virginia federal district court stated this argument was "illogical because it is at odds with the fundamental meaning of the term 'benefit.'" *Id.* The court opined

> Under the plaintiffs [] 'timely guidance' theory, whenever an issue raised in litigation is resolved adversely, the losing litigant would earn attorney's fees, simply for having learned that he was wrong. That, of course, is in complete derogation of the American Rule.

583 So.2d 946, 953, quoting *Allen,* 975 F.Supp. at 809 n.8.

Plaintiff Henri-Duval's argument for attorneys fees is just as preposterous as those made by the unsuccessful litigants in *Lee* and *Allen.* Duval basically is arguing that by learning that its legal argument is wrong, it has benefited the general public. As the court noted in Allen, such an argument "is in complete derogation of the American Rule." Therefore, attorneys fees should not be awarded to the Plaintiff in this matter.

CONCLUSION

The Plaintiff has asked this Court to award it interim attorneys fees because the Plaintiff claims to have bestowed a benefit of the general public in the State of Alabama. However, it has not done so. The repealing of an unconstitutional tax scheme and the implementation of a new constitutional tax scheme will have no impact on the general populace of this state. Extra tax revenue generated will be minimal, and the price of wine will not change for the average consumer. Finally, the Plaintiff lost its argument in this case. The award of attorneys fees to a party who is unsuccessful is in direct contradiction of the American Rule regarding attorneys fees. For the foregoing reasons, the Plaintiffs Motion for Interim Attorneys Fees is due to be **DENIED**:

RESPECTFULLY SUBMITTED, this the 8th day of October, 2004.

/s/ James H. Anderson
JAMES H. ANDERSON
[AND021]
Deputy Attorney General

OF COUNSEL:
BEERS, ANDERSON, JACKSON
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendants' RESPONSE TO AMENDED ORDER OF JULY 27, 2004 has been served upon all parties to this action by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows

J. Doyle Fuller, Esq.
2851 Zelda Road
Montgomery, AL 36106

Robert B. Roden, Esq.
SHELBY & CARTEE
2956 Rhodes Circle
Birmingham, AL 35205

on this the 8th day of October, 2004.

/s/ James H. Anderson
OF COUNSEL

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

HENRI-DUVAL WINERY, L.L.C. individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	**CASE NO: CV-2001-703-GR**
vs.	)	
ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD, et all.	)	
Defendants.	)	

MOTION FOR AWARD OF INTERIM ATTORNEYS' FEES

Comes now the Plaintiff and moves this Court to award to Plaintiff's counsel an interim attorneys' fee, to be paid by the Defendants in this case. As grounds for this Petition Plaintiff shows the following:

1. This action was filed on March 9, 2001 contesting, on Commerce Clause grounds, the validity of Alabama's taxation of table wines sold in this State. In substance the Plaintiff claims that Alabama's scheme of taxation of table wine discriminated against wines manufactured outside the State of Alabama in that the excise tax on such wines was some thirty-four (34) times higher than

the tax imposed on wine manufactured in Alabama.[1]

2. This Court ultimately agreed with the Plaintiff and by Order dated September 17, 2001 declared the Alabama Table Wine Tax embodied in Ala. Code 1975 § 28-7-16 to be unconstitutional.

3. The Supreme Court heard the case on appeal and by Order dated September 19, 2003 agreed that the tax scheme was unconstitutional, but reversed because of a disagreement about the remedy.

4. As a direct consequence of the proceedings in this case, the Legislature of this State passed, and the Governor signed into law Act #2001-1114. (For the Court's convenience a copy of said Act is attached hereto.) Act #2001-1114 (Act 1114) repealed both the Table Wine Tax, Ala. Code 1975 § 28-7-16, and the Native Farm Wine Act, § 28-6-1 et seq. which contained the Native Farm Wine Tax (§ 28-6-4). Act 1114 then enacted a new table wine tax, which is nondiscriminatory, retroactive to October 1, 2001. Thus, the legislature repealed the

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[1] We use the past tense here because the Legislature, in the wake of this Court's September 17, 2001 declaration that the tax violated the Commerce Clause, repealed both the Table Wine Tax and the Native Farm Wine Tax, and adopted a new Table Wine Tax which is evenhandedly applied.

discriminatory tax scheme, and adopted a single nondiscriminatory tax.

5. It is well established in this State that when, through pertinent litigation, lawyers succeed in bringing about a change in the law, especially a change which corrects an illegality in the law, those lawyers are entitled to an award of an attorneys fee. This rule had its origins in *Brown v. State*, 565 So.2d 585 (Ala. 1990) and has come to be called the "common benefit" exception to the "American Rule" on attorneys fees. See for instance, *Horn v. City of Birmingham*, 718 So.2d 694 (Ala. 1998); accord, *Ex Parte Hooks*, 728 So.2d 631 (Ala. 1998); *James v. Alabama Coalition For Equity, Inc.*, 713 So.2d 937 (Ala. 1997); *Advertiser Co. v. Auburn University*, 579 So.2d 645, (Ala. Civ. App. 1991); *Bell v. Birmingham News. Co.*, 576 So.2d 669 (Ala. Civ. App. 1991).

6. The "common benefit" bestowed by the efforts of Plaintiff's counsel in this case is apparent. In *Brown v. State*, supra, the Court was considering the validity of traffic convictions based on unverified complaints. Although the Court did not require a refund of fines paid, and indeed did not even invalidate the convictions, it required the State of Alabama to pay the Plaintiff's attorneys fees because the litigation had brought an end to the improper practice.

As the Court there said:

> This litigation clearly resulted in a benefit to the general public. It is unquestionable that plaintiff's attorneys rendered a public service by bringing an end to an improper practice. The public nature of the services rendered by these lawyers justifies an award of attorney fees.

565 So.2d at 592.

Hence, as in *Brown*, the efforts of the Plaintiff and its lawyers here have brought an end to an improper practice, i.e. the discriminatory taxation of out-of-state wines. Ending a practice by the State of Alabama that is in clear violation of the U.S. Constitution, is most certainly a public benefit.

7. Now that the discriminatory tax scheme is gone, the bifurcated nature of this case is revealed. One aspect of this case was to stop the invalid taxation. The other aspect is to obtain a remedy for the past discrimination. As to the first aspect, the Defendants should, based on the authorities cited above, be required to pay counsel's fees. As to the second, should this Court effectuate a remedy, the Court should then determine an appropriate fee for the remedy phase.

Wherefore, Plaintiff prays that this Court set this matter for a hearing and thereafter award to Plaintiff's

counsel an appropriate attorneys fee to be paid by the Defendants in this case.

Respectfully submitted this the 7th day of July, 2004.

/s J. DOYLE FULLER
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing by placing a copy of same in the United States Mail, first-class postage prepaid to the following:

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Dated this the 6th day of July, 2004.

/s J. DOYLE FULLER
J. DOYLE FULLER, ESQ.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-2001-703

HENRI-DUVALL WINERY, L.L.C. individually And on behalf of all others similarly situated,

Plaintiff,

v.

ALABAMA ALCOHOLIC BEVERAGE CONTROL BOARD, STATE OF ALABAMA, RANDALL SMITH, Individually and in his capacity as Administrator of the Alabama Alcoholic Beverage Control Board, LUCY PARSONS, individually and in her capacity as Chairman of the Alabama Alcoholic Beverage Control Board, DR. WESLEY BARRY, JR., and PHILLIP LOVELL, individually and in their capacity as members of the Alabama Alcoholic Beverage Control Board;

Defendants.

AMENDED MOTION FOR AWARD OF INTERIM ATTORNEY'S FEES

The Plaintiff has heretofore filed a Motion for Award of Interim Attorneys' fees in this case in the wake of the Alabama Supreme Court's ruling in this

case and the passage by the Legislature of Act #2001-1114.

That motion was based upon the "common benefit" rule recognized on numerous occasions by the Alabama Supreme Court. AT the time of filing said motion, counsel for the Plaintiff was of the opinion that the "common benefit" rule was alone a sufficient basis for an award of such fees in this case.

But there is an additional basis for such an award in this case. Among the several actions brought by the Plaintiff in this case is a claim under 42 USC §1983. At least as to the constitutionality of the taxation scheme at issue in this case, the Plaintiff has prevailed.

Therefore, Plaintiff would also be entitled to an award of fees under 42 USC §1988.

Wherefore, Plaintiff amends its Motion for Award of Interim Attorneys fees by adding the additional ground that such fees are recoverable under 42 USC §1988.

Respectfully submitted this the 12th day of June, 2006.

/s J. DOYLE FULLER
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleading by placing a copy of same in the United States Mail, first-class postage prepaid to the following:

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Done this the 12th day of June, 2006.

/s J. DOYLE FULLER
J. DOYLE FULLER